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IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

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CASES

DETERMINED BY

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

R. (BUCK) v. JUSTICES OF THE COUNTY OF LONDONDERRY (1).

Motor car—Conviction for being found to be under the influence of drink or drugs when driving or attempting to drive or when in charge of a motor car—Whether bad for uncertainty—Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926 (16 & 17 Geo. 5, c. 31), s. 2—Motor Vehicles and Road Traffic Act (Northern Ireland), 1934 (24 & 25 Geo. 5, c. 15), s. 2.

Summary Jurisdiction—Certiorari—Power of High Court to amend defective order of conviction.

Section 2 (1) of the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926, as amended by section 2 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934, provides that " if any person is found when driving or attempting to drive, or " when in charge of, a motor car on any highway or other public place " to be under the influence of drink or drugs to such an extent as to " be incapable of having proper control of the vehicle " he shall be liable to punishment on conviction.

(1) In the King's Bench Division (Crown Side) before Lord MacDermott C.J. and Sheil J.; October 25, 30, 1951.

A complaint was preferred against B which alleged that " when " attempting to drive a motor car on the public highway " he was found to be under the influence of drink or drugs. B was convicted and was ordered to pay a fine and his licence was suspended for twelve months. The order of conviction signed by the resident magistrate recited that B " when driving or attempting to drive or " when in charge of a motor car " was found to be under the influence of drink or drugs.

Held, (i) that the section creates three distinct and mutually exclusive offences, viz., being found under the influence of drink or drugs, (*a*) when driving a motor car, (*b*) when attempting to drive a motor car, and (*c*) when in charge of a motor car, and as the order of conviction recited the three offences disjunctively it was impossible to read the conviction as relating to all three offences, or to one offence rather than the others, and that accordingly the order of conviction was bad on the face of it;

(ii) that the court had no power on application for a certiorari to cure by amendment a defective record of conviction in the order book even though it appeared that the complaint and the proceedings at the hearing were regular in every respect;

Semble that a trivial or obvious error in the order book would not necessarily avoid the conviction.

Held further that the fact that B had paid the fine and that the period of disqualification had expired did not constitute a reason why the court in its discretion should refuse relief, since the terms of the conviction might damnify B as to any future offences, having regard to s. 4 of the Act of 1926, as amended.

MOTION to make absolute a conditional order of certiorari.

The prosecutor in this case was convicted as a defendant at Garvagh Petty Sessions on January 12, 1951, of an offence under section 2 (1) of the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926, as amended by section 2 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934 (1). The terms of the complaint originating the proceedings appeared in the summons as follows:—

(1) Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926, s. 2 (1), as amended by Motor Vehicles and Road Traffic Act (Northern Ireland), 1934, s. 2: " If " any person is found when driving " or attempting to drive, or when " in charge of, a motor car on any " highway or other public place to " be under the influence of drink or " drugs to such an extent as to be " incapable of having proper control " of the vehicle, he shall be liable— " (*a*) on summary conviction " to a fine . . . not exceeding " fifty pounds, or in the case of a " second or subsequent con- " viction to a fine . . . not " exceeding one hundred " pounds . . ."

"Whereas, a Complaint has been made to me that "on the 30th day of November, 1949, at Main Street, "Garvagh, in the said district and county, you, the "said defendant, when attempting to drive a motor "car on the public highway were found to be under "the influence of drink or drugs to such an extent "as to be incapable of having proper control of the "vehicle. Contrary to Sec. 2 of the Motor Vehicles "and Road Traffic Act (Northern Ireland), 1934."

The case was heard by a resident magistrate who found the offence proved and thereupon convicted the prosecutor (the defendant at petty sessions). The entry in the order book as signed by the resident magistrate after adjudication pursuant to section 21 (1) of the Petty Sessions (Ireland) Act, 1851, recited the complaint as follows:—

"That on the 30th day of November, 1949, at "Main Street, Garvagh, in the said County, "defendant found when driving or attempting to "drive or when in charge of a motor car, to wit, . . . "on the highway to be under the influence of drink "or drugs to such an extent as to be incapable of "having proper control of said vehicle, Contrary "Motor Vehicles and Road Traffic Acts (Northern "Ireland), 1926 to 1934. . . ."

and continued:—

"Defendant convicted and ordered to pay for "fine, the sum of £5 0*s*. 0*d*., and for costs the sum "of 35*s*. 3*d*. in eight days and in default of payment "to be imprisoned in Belfast Gaol for the period of "two months unless said sums be sooner paid, "1*s*. 0*d*. to be added to costs if warrant issued. "Licence suspended during the remainder of its "currency and defendant disqualified from holding "a licence for twelve months from this date."

The prosecutor applied for and obtained a conditional order of certiorari to have the order made at petty sessions removed into the King's Bench Division of the High Court for the purpose of being quashed on the ground that it was bad for uncertainty. Objection

was taken solely on account of the form of the order as it appeared in the order book. The prosecutor now moved to make absolute the conditional order.

Gibson for the prosecutor.
Nicholson K.C. and *Lowry* for the Crown.

Cur. adv. vult.

LORD MACDERMOTT C.J. [after reciting the terms of the complaint and of the order of conviction]: The difference between the complaint as preferred and the complaint as set forth in the certificate and order book is noticeable. The complaint actually made relates only to "attempting to drive a motor car." But, as subsequently entered in the order book, it relates to "driving or attempting to drive or when in charge of "a motor car." No alteration of the charge was sought at the hearing, and there is nothing to suggest that the learned resident magistrate either directed or had cause to direct any amendment. The discrepancy, in my opinion, can only be explained by a clerical error made in the course of filling up the columns in the order book and unnoticed by the resident magistrate when he signed the entry. It is common knowledge that section 2 (1) of the Act of 1926 is often invoked by the form of complaint set out, by means of a rubber stamp, in this certificate, and it may well be that the error in this case was due to the careless use of the same or a similar stamp in the order book. But, whatever the precise manner in which the mistake arose, it is clear that had the order book been properly made up the complaint would have been set forth therein according to the only form it ever took — namely, that appearing in the summons.

Now it is beyond dispute that, if this had been done and there had been no such mistake, the present attempt to quash the conviction could not possibly succeed. That was, indeed, admitted. But counsel for the defendant argued that this court had to take the conviction as recorded in the order book, there

being, it was said, no jurisdiction on certiorari to amend the entry, even to the limited extent of making it correspond with the facts. This submission raises a matter of general importance and I shall deal with it now.

Various attempts have been made by the Legislature from time to time to cure defective convictions in instances not involving the merits. But I am unable to find in the resulting enactments any power that could be called in aid in the present case. Section 39 of the Petty Sessions (Ireland) Act, 1851, relates to charges which are defective as laid and offers no help where the charge is right as laid and wrong as copied into the order book. Section 6 of the Summary Jurisdiction Act, 1857, only confers a power to amend the order where the procedure is by way of case stated, and section 49 of the Civil Bill Courts (Ireland) Act, 1864, is limited to appeals to quarter sessions. At first sight section 76 of the County Officers and Courts (Ireland) Act, 1877, is more promising, but a close reading of its provisions has satisfied me that there is nothing in them which can be invoked in these proceedings. The first limb of the section must be regarded as distinct from the second: see *R.* (*Athy U. D. C.*) *v. Kildare JJ.* (1). But the first limb only saves convictions from being quashed where there is some defect in the "summons, charge, or information "on which the same shall purport to have been made," and the defect here does not lie in that direction. The second limb is no more appropriate, as the power to amend which it confers is confined to the summons, charge, or information, and is not applicable to cases such as this where it is the conviction, and not the charge, that calls for amendment.

In this connection it is worth observing that in England provision was made by section 7 of the Quarter Sessions Act, 1849, to meet the kind of difficulty which has now arisen. The preamble to that section was as follows:—

(1) [1912] 2 I.R. 64.

"VII. And whereas in many Cases, where "Justices of the Peace are by Law empowered to "make Orders or to give Judgments, great Expense "and frequent Failures of Justice have been "occasioned by reason that such Orders or Judg- "ments have, on Appeal to the General or Quarter "Sessions of the Peace, or on Removal by Certiorari "into the Court of Queen's Bench, been quashed or "set aside upon Exceptions or Objections to the "Form of the Order or Judgment, irrespective of "the Truth and Merits of the Matters in question :"

The section then proceeded :—

"For Remedy thereof be it enacted, That if upon "the Trial of any Appeal to any Court of General or "Quarter Sessions of the Peace against any Order "or Judgment made or given by any Justice or "Justices of the Peace, or if upon the Return to any "Writ of Certiorari any Objection shall be made on "account of any Omission or Mistake in the drawing "up of such Order or Judgment, and it shall be "shown to the Satisfaction of the Court that "sufficient Grounds were in Proof before the Justice "or Justices making such Order or giving such "Judgment to have authorized the drawing up "thereof free from the said Omission or Mistake, it "shall be lawful for the Court, upon such Terms as "to Payment of Costs as it shall think fit, to amend "such Order or Judgment, and to adjudicate there- "upon as if no such Omission or Mistake had "existed : Provided . . ."

The reference to proceedings on certiorari in this enactment have been deleted by the Administration of Justice (Miscellaneous Provisions) Act, 1938, which abolished the writ of certiorari in England. This repeal, however, is not now in point, as the relevance of section 7 lies in the fact that the problem to which it was directed required a statutory remedy. There is no similar provision in this country, an omission which, whatever its cause, cannot be explained on the ground that in Ireland the superior courts had an inherent jurisdiction to direct an amendment of this

sort on certiorari. The existence of such a jurisdiction is not suggested in any of the judgments of the full court in *R. (Athy U. D. C.) v. Kildare JJ.* (1), and, so far as I am aware, there is no authority for it.

I do not think this need be taken the length of meaning that regard must be paid by this court to every error in a conviction, no matter how trivial or obvious on the face of the order such error may be. I would, for example, be slow to conclude that the present conviction would have been vulnerable on certiorari had its only defect been, say, a reference to the years of the relevant statutes as "1826 to 1834" instead of "1926 to 1934." Such a mistake would be so glaring and apparent as to convey its own correction, and no one could be prejudiced thereby. But the present is not a case of that kind. The error here is neither trivial nor such as to be apparent to anyone reading the order without a knowledge of what was in the summons, and for the reasons mentioned there is, in my opinion, no power on certiorari to cure it by amendment. We must therefore deal with the entry in the order book as it stands.

I confess I have reached this conclusion with regret, and I hope it may not be long before the Legislature sees fit to confer on this court a power of amendment which will prevent, or at least discourage, convicted persons from using certiorari to escape the consequences of their crimes on grounds which have nothing to say to the justice or merits of their conviction, and which depend solely on an error made in recording the adjudication. The defendant here was convicted of a serious offence on a valid complaint and after a hearing against which not a word has been said. He did not seek a rehearing by an appeal to quarter sessions, as was his right. Instead, months after the resident magistrate had given his decision, and in the hope, no doubt, that the order book might prove defective, he launched the present proceedings and is now entitled to ask this court to consider his case as though

(1) [1912] 2 I.R. 64

there had been no mistake and as though he had been convicted on a complaint which, in fact, was never made against him. He must, of course, have his rights according to the law as we find it ; but for my part I think the sooner the law is changed in this respect the better it will be for the protection of the public and the due administration of justice.

Before going further there are two things I desire to say in order to avoid misunderstanding. The first is that there is nothing in the present state of the law to excuse careless and slipshod methods in the course of proceedings before courts of summary jurisdiction. It is essential to the proper working of the system that pains should be taken in the preparation and completion of all the necessary documents and entries, and that if such aids as rubber stamps are employed they should be used intelligently and with a close regard to the facts and circumstances of the particular case. I think there is a laxity about these matters in some districts, though not in all. The need for care starts with the summons which, far too often, is ill-drawn and obscure, though I hasten to add that in this case it appears to have been drafted in a careful and discriminating manner. It is the duty of those who invoke the jurisdiction of the summary courts, and no less of those whose task it is to record their decisions, to take care that what they write is accurate and also understandable.

The second matter arises from the view of the merits which I have expressed, and which naturally brings to mind the discretionary nature of the jurisdiction on certiorari. In my opinion, counsel for the complainant were right in refusing, on the facts of this case, to appeal to this discretion. Even if the defendant has paid his fine and is now beyond the period of the disqualification imposed he may still be damnified by the terms of the conviction as respects future offences, having regard to the provisions of section 4 of the Act of 1926 (as amended). As Holmes L.J. said in *R.* (*M'Swiggan*) *v. Londonderry JJ.* (1) :

(1) [1905] 2 I.R. 318, 323.

" I also accept the proposition that a person whose " rights may be affected by an illegal or invalid order " of an inferior Court, or who may be otherwise " prejudiced thereby, is entitled to have the order " quashed, unless he is precluded by his conduct or " by delay from making the application."

I turn, then, to an examination of the conviction as it appears in the certificate. The defendant contends that on its face it is bad for uncertainty. Now if section 2 (1) of the Act of 1926 (as amended) creates three separate offences, it is clear enough that this contention must prevail ; for in that event the terms of the order leave it in doubt whether the conviction has been in respect of " driving " or " attempting to " drive " or being " in charge of " a motor car. The uncertainty (on this hypothesis) does not arise merely from the fact that, according to the order, three offences appear to have been charged in the complaint, as in this country, unlike England (where more than one charge in the same process is forbidden by section 10 of the Summary Jurisdiction Act, 1848) a joinder of charges is generally permissible. It arises from the fact that the offences are recited as charged disjunctively and so as to make it impossible to read the conviction as relating to them all or to one rather than the others. For the complainant, however, it is submitted that section 2 (1) of the Act of 1926 (as amended) creates, on its correct interpretation, but one offence, and, accordingly, that there can be no dubiety as to the nature of the offence of which the defendant has been convicted. Thus there emerges what must be regarded as the main issue in the case, namely, does section 2 (1) create three offences or one ?

I have found this a difficult question. The problem it raises turns for its solution on whether the disjunctive language of the enactment describes so many offences or so many ways of committing a single offence. The nature of the choice may be illustrated by reference to the words " drink or drugs." In *Thomson v. Knights* (1), similar words were held by the King's

(1) [1947] K.B. 336.

Bench not to duplicate the number of offences otherwise created by section 15 of the Road Traffic Act, 1930, the corresponding English enactment. As Lord Goddard said (1) : " I think Mr. Gordon is right when " he says that the words ' under the influence of drink " ' or a drug ' are merely adjectival. The offence is " driving, or attempting to drive, or being in charge " of a vehicle, when the man is incapable of having " proper control of the vehicle, and that incapacity " is caused by a drink or a drug. I do not think " Parliament here meant to create one offence of being " incapable by reason of a drug and another offence of " being incapable by reason of drink." Are, then, the words " driving or attempting to drive, or when " in charge of " also merely adjectival, or do they mark different offences ? In the case last cited Lord Goddard expressed the opinion that the English section creates three offences, and in the recent case of *Jones v. English* (2), he appears to be still of that view. These dicta, however, though entitled to every respect, were obiter, and I am not aware of any authority in which the point that has now to be determined was argued and decided.

For that reason and also because, the question being one of construction, decisions on different texts afford but little guidance, I do not propose to examine all the cases cited in the course of the argument. But reference may be made in passing to two decisions which serve to show the difficulty of laying down any precise rule in the matter or of drawing a clear line between one type of enactment and the other. First, there is the Scottish case of *Stenhouse v. Dykes* (3), where it was held, in effect, that section 1 of the Street Betting Act, 1906, which provides that " any person " . . . loitering in streets or public places . . . for " the purpose of bookmaking or betting or wagering, " or agreeing to bet or wager, or paying or receiving " or settling bets, shall . . . be liable on conviction " . . . . to a fine . . ." created but a single offence

(1) [1947] K.B. 336, 338.
(2) [1951] 2 All E. R. 853.
(3) [1908] S.C. (J.) 61.

The accused had been convicted generally on a charge which followed closely the alternative wording of the statute, but the court held that the conviction and sentence were competent. In the course of his judgment the Lord Justice-Clerk said (1) : " As to the first " objection that this was a general conviction following " on an alternative charge, I see no ground for it. " The Act specifies loitering as an offence in certain " circumstances, namely, loitering for the purpose of " bookmaking or betting or wagering, or agreeing to " bet or wager, or paying or receiving or settling bets. " If a man is found loitering for all or any of these " purposes, it does not matter which, he is liable to " fine or imprisonment. In many cases where two " modes of committing a crime are specified a general " conviction cannot follow, but it is not the law that " wherever you find the word ' or ' you have an " alternative charge. I think that this case is very " like that in which it was held that where a man was " charged with trespass in pursuit of ' game, or of " ' deer, roe, woodcocks, snipes, quails, landrails, wild " ' ducks, or conies,' a general conviction following on " that charge was not bad. It was held that all these " details were merely descriptive of the mode in which " the crime might be carried out." And secondly, there is *Bastin v. Davies* (2), in which the King's Bench in England held that three distinct offences were created by section 3 (1) of the Food and Drugs Act, 1938, which enacts that " if a person sells to the " prejudice of the purchaser any food . . . which is " not of the nature, or not of the substance, or not of " the quality of the food . . . demanded . . . he " shall be guilty of an offence." Mention may also be made of a series of decisions, commencing with *R. v. Wells* (3), and *R.* (*Burrowes*) *v. Cavan JJ.*, (4), which constrained counsel for the complainant to concede that section 1 (1) of the Act of 1926, as amended by section 1 (1) of the Act of 1934, created not one but three offences. It will be convenient to set out the

(1) [1908] S. C. (J.) 61, 63.
(2) [1950] 2 K.B. 579.
(3) (1904) 91 L.T. 98.
(4) [1914] 2 I.R. 150.

material parts of this last enactment for comparison with those of section 2 (1). They read as follows :—

" (1) If any person drives a motor car on a public " highway recklessly or at a speed or in a manner " which is dangerous to the public, having regard " to all the circumstances of the case, including the " nature, condition and use of the highway, and the " amount of traffic which is actually at the time, or " which might reasonably be expected to be, on the " highway, he shall be liable—

" (*a*) on summary conviction to a fine . . . not " exceeding ten pounds, or in the case of a " second conviction to a fine . . . not " exceeding twenty pounds, or in the case of " a third or subsequent conviction to a " fine . . . not exceeding fifty pounds . . ."

Coming to the language of section 2 (1), I think it would be difficult, if one were not to look beyond it, to arrive at a confident and reasoned decision between the rival contentions. On the one hand, the expressions " driving," " attempting to drive " and " when in charge of " are far from being synonymous. They are descriptive of what may be quite distinct situations, with the person charged having a different part and a different case to meet under each. " Driving" and " attempting to drive " seem mutually exclusive, and although a person " driving " or " attempting to " drive " may also be " in charge " of the car, it is, I think, clear that a person may be " in charge " who is neither driving nor attempting to drive. If they stood alone these considerations would point to three offences rather than to a single offence having for its essential element, as the complainant submitted, an incapacity due to drink or drugs while in a position to control or assume control of a motor car on the highway. But, on the other hand, the provisions of section 2 (1) as to penalties seem to me to point in the opposite direction. I am of opinion that the words " a second or subsequent " conviction " connote a conviction in respect of an offence later in point of time. See *R. v. South Shields Licensing Justices* (1). But, that being so, can it be

(1) [1911] 2 K.B. 1.

said that the maximum penalty can be awarded for each of several offences under the section committed on the same occasion, and arising out of the same event? I do not think it can. In my view, what this part of the enactment means is that there is to be a maximum penalty in respect of each occurrence or incident, and if that is sound it must, I think, follow that not more than one conviction can follow from one occurrence. While, as I have said, this seems to me to bear against the argument for three offences it is not, of course, conclusive. It may be that the alternatives of the sub-section must be regarded as mutually exclusive in relation to the same facts. As already indicated they are not all mutually exclusive by reason of their nature; but if they describe three offences and not one, I think they should be held mutually exclusive on the ground that the wording of the sub-section, and in particular its use of the disjunctive, so requires.

With section 2 (1) giving no clear and certain answer to the question under discussion, it is necessary to look beyond it. I do not derive much assistance from tracing the development of this sub-section in the statute book during the period 1926-1934. There are, however, three statutory provisions lying outside it which, to my mind, tip the scale against the complainant and his argument in support of a single offence.

The first of these is to be found in section 1 (1) of the Act of 1926 (as amended). The subject-matter of that sub-section is, of course, quite different from that of section 2 (1); but the general structure is not markedly dissimilar and if, as I think, one must now take section 1 (1) as creating three offences there is, to my mind, considerable difficulty in formulating satisfactory reasons for holding that section 2 (1) creates only one offence.

The second statutory provision is to be found in section 3 of the Act of 1934. This section amends section 4 of the Act of 1926 (which deals with sus-

pension and disqualification) and provides, by subsection (2) thereof, that "Where a person has been "convicted of . . . being under the influence of drink "or drugs while in charge of a motor car, and the "licence held by such person . . . has been suspended "or he has been disqualified from obtaining such a "licence such person shall not be entitled to apply to "the court for the removal of such suspension or dis-"qualification until after the expiration of twelve "months from the date of the conviction which "resulted in the suspension or disqualification." As originally enacted section 2 (1) said nothing of "driving" or "attempting to drive" and related only to a person drunk "while in charge on any "highway or other public place of a motor car." The other expressions were first added by the amending Act of 1929, and signs are not lacking that the Legislature made considerable delay in dealing with the provisions which were obviously affected by this change. Thus, section 51 of the Act of 1934 made the Probation of Offenders Act, 1907, inapplicable to the offence of being under the influence of drink or drugs while in charge of a motor car, but not while driving or attempting to drive. This omission was rectified in the following year by section 56 of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, and that may suggest that the provisions of section 3 (2) of the Act of 1934 take their restricted form because of a similar inadvertence, and are not to be regarded as manifesting any intention on the part of the Legislature to discriminate between the alternatives of section 2 (1). But no attempt has been made to amend section 3 (2) of the Act of 1934, and it would, in my opinion, be contrary to the ordinary canons of construction to disregard the plain import of its terms on the assumption of a drafting error or oversight. The position, therefore, is that section 3 (2) of the Act of 1934 renders the possible consequences of a conviction for being under the influence of drink or drugs while in charge of a motor car different from the possible consequences of a conviction for being under such influence while driving or attempting to

drive a motor car in a material and important respect. This is a circumstance which, in my opinion, makes it well-nigh impossible to hold that section 2 (1) creates but a single offence.

The third of the statutory provisions referred to is to be found in section 52 of the Act of 1934, which confers a special power of arrest, in certain cases, in respect of the offence of being under the influence of drink or drugs while in charge of a motor car but not in respect of the offence or offences of being under the influence of drink or drugs while driving or attempting to drive a motor car. This provision remains unamended and its effect cannot, in my opinion, be distinguished from that of the omission in section 3 (2), which has just been considered.

For these reason I would hold that section 2 (1) of the Act of 1926 (as amended) creates three mutually exclusive offences, and not one offence. From this it necessarily follows, if I am right in the views I have expressed concerning the power to amend a conviction in proceedings of this sort, that the order in this case cannot stand and ought to be quashed. The conditional order must, therefore, be made absolute. There will be no order as to costs.

Sheil J. : I agree.

Order absolute.

Solicitor for the prosecutor :- *R. Evan Burns.*

Solicitor for the Crown : *Chief Crown Solicitor.*

J.P.

REG. (MOONEY) v. COUNTY COURT JUDGE OF DOWN (1).

Licensing Acts—Objection to grant of certificate withdrawn by police—Whether competent for court to adjudicate upon the objection.

The police lodged an objection to the grant of a licensing certificate but withdrew the objection before the hearing.

Held, that the court could not refuse to grant the certificate on the ground that the applicant was unfit unless it had before it an objection by a competent objector, and that it was open to the police to withdraw an objection at any time before the commencement of the process of adjudication.

MOTION to make absolute conditional orders of certiorari and mandamus.

On June 14, 1951, James Mooney agreed to purchase certain licensed premises in Donaghadee and on August 3, 1951, he applied to petty sessions for and was granted a temporary transfer in respect of the premises. He entered into occupation of the premises and carried on business thereon. On September 4, the premises were assigned to him, whereupon he applied to the Court of Quarter Sessions at Newtownards for a certificate to entitle him to a transfer and confirmation of transfer of the licence, notice of his intention to apply having seen served upon District Inspector Luke of the Royal Ulster Constabulary. On September 28 he was served with a summons alleging breaches of the Intoxicating Liquor Acts, whereupon District Inspector Luke lodged an objection to his application for the certificate on the grounds: (i) that a prosecution was pending against the applicant for a breach of the Intoxicating Liquor Acts, and (ii) that he was an unfit person to be granted a licence to sell intoxicating liquors by retail. On November 5 the application came on for hearing at quarter sessions and was adjourned to the following sessions so that the summons against him could first be heard and

(1) In the Queen's Bench Division (Crown Side) before Lord MacDermott C.J. and Sheil J.: March 7, 1952.

adjudicated upon. The summons was heard on December 7 and was dismissed on the merits. On February 4, 1952, when the adjourned application came on for hearing and before any evidence was heard, counsel for the applicant informed the court that the police had withdrawn their objection in view of the fact that the summons had been dismissed, whereupon the learned county court judge observed that he might not be disposed to hold the same opinion as the resident magistrate and called for evidence regarding the offences alleged in the summons. The applicant then gave evidence and, though the District Inspector reiterated that the police objection had been withdrawn, the learned county court judge made an order refusing the application, holding that the applicant was not a fit person to hold a licence. Conditional orders of certiorari and mandamus having been applied for and granted on February 11, 1952, the applicant now applied to have the orders of certiorari and mandamus made absolute on the grounds that the order and adjudication of the learned county court judge was bad in law and on its face, and was made without and in excess of jurisdiction.

Stewart Q.C. and *Little* for the prosecutor. There was no legal objection but only a notice of intention to object. The objector must be external to the tribunal: *R.* (*Perry*) *v. Tyrone JJ.* (1). An objection once made is not irrevocable: *Reg.* (*Marshall*) *v. Tyrone JJ.* (2).

Lowry for the defendant. It is the duty of the learned county court judge to satisfy himself of his jurisdiction to grant an application of this kind: *R.* (*Byrne*) *v. Divisional Justices of Dublin* (3). This, however, is a case where the order asked for ought to be granted. *R.* (*Perry*) *v. Tyrone JJ.* (1) is a very direct authority and illustrates the narrow construction of the jurisdiction of the inferior courts. *Reg.* (*Marshall*)

(1) (1904) 38 I.L.T.R. 26.
(2) [1896] 2 I.R. 15.
(3) (1903) 37 I.L.T.R. 250.

v. Tyrone JJ. (1) is authority to show that in certain circumstances an objection may be withdrawn, but it would be too general to say that in every case the withdrawal of the objection would be sufficient to deprive the court of jurisdiction. It would be going too far to hold that when the process of adjudication had commenced the objector could take it upon himself to control the jurisdiction. The necessarily strict interpretation of the law regarding jurisdiction in these matters does not mean that there is a danger of improper applicants slipping through, because even where there is no objection, if facts transpire which might justify an objection, the application may be adjourned for the purpose of bringing those facts to the attention of the police: *Reg.* (*Morgan*) *v. Tyrone JJ.* (2).

LORD MACDERMOTT C.J.: The material facts may be shortly stated. The prosecutor, James Mooney, purchased a public house in Donaghadee last summer, and obtained an interim transfer from the resident magistrate on August 3, 1951. He then applied to quarter sessions in October for the necessary certificate. In the meantime he was served, on September 28, with a summons charging several offences under the Intoxicating Liquor Acts in relation to the said premises. On October 5 the police made objection to the grant of the certificate on the ground that the prosecutor had this prosecution pending against him and was an unfit person to hold a licence. This was a ground of objection open to the police under the relevant statute. It is quite clear, as appears from the affidavit of District Inspector Luke, that the police objection was based entirely on the fact that the applicant was a person who had been charged with breaches of the liquor laws. There is nothing to indicate that the police objection was based on any allegation of general unfitness.

The matter came before quarter sessions in November and the District Inspector announced his objection.

(1) [1896] 2 I.R. 15. (2) [1896] 2 I.R. 318.

It was then stated that this prosecution was pending and the court adjourned the application until February. In the meantime, in the month of December, the complaints enumerated in the summons were heard and dismissed on the merits. When the case came again before quarter sessions in February the basis of the police objection had gone, as the prosecutor had been acquitted, and the objection was accordingly withdrawn by the police. Notwithstanding that, the learned county court judge appears to have considered himself free to review the circumstances out of which the prosecution arose and, having heard evidence, he came to the conclusion that the prosecutor was not a fit person to hold a licence. It is clear that he came to that conclusion on the facts which had led to the prosecution, but it is right to observe that he did not find that the offences charged had in fact been committed, but just that the prosecutor was unfit on the evidence.

The first question is whether it was open to the learned county court judge to find that the prosecutor was an unfit person of his own motion, that is to say, in the absence of objection by a competent objector. That question must be answered in the negative on the authority of *R.* (*Perry*) *v. Tyrone JJ* (1). In order to rule the prosecutor unfit it was essential for the court to have before it an objection made by a competent objector under the statute.

The second question is whether the learned county court judge had before him an objection by a competent objector. As I have said there is no doubt about the competence of the police to object as they did. The question is whether having lodged their objection they had power to withdraw it, or, to put it another way, whether the law is such that once an objection is made the court must adjudicate upon it. In my view much depends upon the stage of the proceedings at which the attempt to withdraw the objection is made. It may be that, once an objection

(1) (1904) 38 I.L.T.R. 26.

has actually been urged before the court, the court has then a duty to adjudicate upon it, notwithstanding that the objector may, during the hearing, wish to withdraw. It is not necessary to decide that point here, because in this case the objection was withdrawn before the court had really begun to consider the application. The hearing had been adjourned in November without being entered upon, and I am satisfied that in February the objection was withdrawn before the process of adjudication had actually commenced. The only question, then, is whether an objection once made may competently be withdrawn in such circumstances ; and on that I think the case of *Reg.* (*Marshall*) *v. Tyrone JJ.* (1) is decisive. The police there were held entitled to withdraw after a writ of mandamus had issued for a rehearing and before the rehearing had got under way.

In my opinion, it being competent for the police to withdraw at the stage they did, the learned county court judge was not entitled to adjudicate upon the objection and was wrong in refusing the application.

A writ of certiorari must therefore issue and there will issue as well a mandamus in peremptory form directing the learned county court judge to grant the certificate.

SHEIL J. : I concur.

Orders absolute.

Solicitor for the prosecutor : *D. H. Smyth.*
Solicitor for the defendant : *Chief Crown Solicitor.*

S. M. M.

(1) [1896] 2 I.R. 15.

CONNOLLY v. HUDDLESTON (1).

Practice—Costs—Claim and counterclaim in action for negligence—Costs to follow verdict of liability rather than share of responsibility.

In an action for damages for negligence if the jury find both parties equally to blame and award the plaintiff half his total damages on the claim and the defendant half his damages on the counterclaim the plaintiff will ordinarily be entitled to his costs of the action other than those exclusively referable to the counterclaim, and the defendant to his costs exclusively relating to his counterclaim.

ACTION for damages for negligence. The case is reported only on the question of costs and such facts as are referable to this issue appear from the judgment.

Stewart Q.C. and *Kelly* for the plaintiff.

McSparran Q.C. Harrison Q.C. and *Lowry* for the defendant.

LORD MACDERMOTT C.J. : In this case the plaintiff sued for damages for severe personal injuries alleged to be due to the negligence of the defendant in the driving of his motor taxi. The defendant denied negligence, alleged that the plaintiff's own negligence was the cause of the accident and counterclaimed for damages in respect of the cost of repairs to his taxi and the cost of hiring another vehicle while it was off the road. The jury found both parties equally to blame and, having assessed the total damages on the claim at £3,860 and on the counterclaim at £110, awarded the plaintiff and defendant half of these sums respectively.

Judgment was accordingly given for £1,930 on the claim and £55 on the counterclaim and the matter stood over on the question of costs. The defendant argued that these should reflect the degrees of responsibility and that there should therefore be half costs to

(1) In the Queen's Bench Division before Lord MacDermott C.J. ; Feb., 27, 28, 29, 1952.

each party. The plaintiff argued that he should get his full costs on the merits, and that in a case of this kind, where there is no counterclaim, it is the practice for a plaintiff who recovers but a portion of his total damages to get full costs. Against this it was urged that where there is a counterclaim this practice does not apply.

It seems to me that the fact that there is a counterclaim is, generally speaking, a factor to be taken into consideration. But the weight to be given to it may vary greatly. For example, it may be that both parties have claims that are similar in substance and nature, and in that event it would be strange indeed if the accident of who was the first to issue a writ should control the ultimate position. On the other hand, and at the other end of the scale, it may be that the counterclaim would never in itself have justified a plaintiff's action in this court, and where that is so, much less will turn on it. So far, then, as the exercise of a judicial discretion is concerned, each case of claim and counterclaim must be judged on its own particular facts.

I have come to the conclusion that the proper view in this case is that the costs should follow the verdict as to liability rather than the shares of responsibility. I doubt if this court would ever have heard of this counterclaim as a substantive action. It would, as a separate suit, probably have been a matter for the county court. In every sense it was but a small part of the present proceedings. Not only did it relate to a small part of the total damages suffered, but it added little to the volume of the evidence or the length of the trial. Assuming the discretion of the court to be unfettered, these are matters to be taken into account. In my opinion the plaintiff is entitled to get his costs of the action other than the costs referable to the counterclaim, and the defendant is entitled to get his costs of the counterclaim, one set of costs to be set off against the other, and judgment to go for the balance as certified by the Taxing Master

The trial having been with a jury, the matter has also to be regarded from the point of view of section 53

of the Judicature Act of 1877, as reflected in Order 65, rule 1. To my mind this enactment leads to exactly the same result as that I would have reached on a purely discretionary basis. In my opinion the event on the claim has fallen in favour of the plaintiff and the event on the counterclaim has fallen in favour of the defendant.

Therefore, either in the exercise of an unfettered discretion or under the statute, I hold in favour of the plaintiff's contention. I would add that I have considered very carefully the case of *Woodman v. Bingham* (1) and am satisfied that it lays down no principle in conflict with the present decision.

Judgment accordingly.

Solicitor for the plaintiff : *J. G. Lennon.*

Solicitor for the defendant : *C. & H. Jefferson.*

S. M. M.

(1) Not reported.

DIXON v. FORSTER & McMAHON (1).

Summary jurisdiction—Appeal—Recognizance for prosecution of appeal—Officer of customs and excise not exempt—Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935 (25 & 26 Geo. 5, c. 13), s. 24.

The Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, s. 24 (3) (*c*) provides that any person appealing from the decision of a court of summary jurisdiction shall enter into a recognizance to prosecute the appeal. By s. 24 (3) (*n*) an exception is made in a case where the appellant is " a public or local authority ".

Held, that an officer of customs and excise prosecuting an appeal in relation to an offence under the Customs Acts is not a public authority within this section and that accordingly such officer is not exempt from entering into a recognizance.

An officer of customs and excise, though he sues on behalf of the Crown, does not shed his own personality in the process, and the recognizance accordingly binds himself. It is not correct to view the proceeding as the Crown entering into an obligation with itself.

CASE STATED by the County Court Judge for the County of Londonderry.

On February 3, 1950, summonses grounded on informations were brought against the respondents at petty sessions under section 186 of the Customs Consolidation Act, 1876, for being knowingly concerned in removing certain prohibited goods with intention to evade the export prohibition applicable thereto, and under section 3 (1) of the Import, Export and Customs Powers (Defence) Act, 1939, for being the exporters of prohibited goods brought to Mullinahunch for the purpose of being exported in contravention of an order made under the said Act. These proceedings were dismissed by the resident magistrate, and the appellant, an officer of customs and excise, appealed to the Court of Quarter Sessions. The appellant did not at any time enter into any recognizance to prosecute the appeals and no recognizance was in fact entered into in relation to these appeals.

(1) In the Court of Appeal before Lord MacDermott C.J., Porter and Black L.JJ.; May 7, 8, 1951.

At the hearing it was contended on behalf of the respondents that the appellant was bound by the provisions of section 24 (3) (*c*) of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935 (1) ; that his appeals were incompetent and that there was no jurisdiction to entertain them, and that by section 218 of the Customs Consolidation Act,1876, proceedings under that Act were required to be brought in the name of an officer of customs and excise and that such an officer was therefore the only proper complainant and was not one of the persons exempt from entering into a recognizance. On behalf of the appellant it was contended that he was exempted by section 24 (3) (*n*) of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935 (2) and by virtue of being a representative of the Crown from entering into a recognizance and that, as the proceedings were proceedings by the Crown, the

(1) Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, s. 24 (3) (*c*) : " The " appellant shall, after giving " notice of appeal to the clerk of " petty sessions and within ten days " after the day on which the " decision of the court of summary " jurisdiction was given, enter into " a recognizance, with or without " sureties, as the said court or any " resident magistrate or justice of " the peace having jurisdiction in " the petty sessions district for " which the said court acted may " have directed, and in such reason- " able sum as, having regard to the " purpose of the recognizance and " to the means of the appellant, the " said court, resident magistrate or " justice of the peace may think " necessary to fix, conditioned to " prosecute his appeal with diligence " and to pay such costs as may be " awarded by the said court of " quarter sessions, and in the case " of an order to imprison, not to " abscond pending the execution of " the original order or of the judg- " ment or order of the court of " quarter sessions ; or with the " consent of the said court of " summary jurisdiction, resident " magistrate or justice of the peace " the appellent may as respects the " whole or any part of the sum so " fixed give such other security, by " deposit of money with the clerk " of petty sessions, or otherwise, as " the said court, resident magistrate " or justice of the peace deems " sufficient ; "

(2) Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, s. 24 (3) (*n*) : " The " provisions of this sub-section " requiring an appellant to enter " into a recognizance or to give " other security shall not apply " where the appellant is a police " officer or constable and is appeal- " ing by virtue of any powers given " to him as such police officer or " constable, or where the appellant " is a public or local authority."

Crown, could not enter into a recognizance with itself. The County Court Judge held that the appeals were incompetent and the matter then came before the Court of Appeal, the question raised by the case stated being whether he was right in so holding.

Harrison K.C. and *Lowry* for the appellant. The customs officer is nominated by the Crown to exhibit the information and to prosecute the proceedings. Sections 147 and 255 of the Customs Consolidation Act, 1876, emphasise that the proceedings in each case are for the recovery of a Crown debt, payable to the Crown, and that the control of the proceedings does not rest in the customs officer. For instance, the commissioners and not the nominated officer elect whether to sue for the treble penalty of £100, and likewise it is their decision whether or not to remit the penalty imposed. The whole control of the proceedings is in their hands. *R (Meehan) v. Tyrone JJ.* (1); *Firman v. Malocca* (2). The proceedings are not by a private person but by the Crown through its agent or officer and the customs officer is himself a substantive officer of the Crown: *Barry v. Arnaud* (3); *Reg. v. Beadle* (4); *Commissioners of H.M. Works and Public Buildings v. Pontypridd Masonic Hall Company, Limited* (5). It would be ultra vires for the Northern Ireland Parliament to require that a customs officer should have to enter into a recognizance as a condition precedent, because to do so would be to purport to legislate on a reserved matter. Sub-sections (3) (*c*) and (3) (*n*) of section 24 are not to be construed as binding the Crown or any Crown servant acting within the scope of his authority in the discharge of his duties. There are circumstances where the act of the man is the act of the Crown. *Cooper v. Hawkins* (6). The Crown is a public authority: *The Danube II* (7); *Morton v. The Air Ministry* (8). On the question of

(1) [1934] N.I. 120.
(2) [1944] N.I. 91.
(3) (1839) 10 Ad. & El. 645, 670.
(4) (1857) 7 El. & Bl. 492.
(5) [1920] 2 K.B. 233.
(6) [1904] 2 K.B. 164.
(7) [1921] P. 183.
(8) [1946] N.I. 136.

whether the actual exceptions in sub-section (3) (*n*) can be used as a valid argument for the proposition that everyone not expressly excepted is bound, we rely upon the *Bombay* case (1) as a starting point. The Crown must be bound either expressly or by necessary implication. Saving clauses are very often unnecessary and sub-section (3) (*n*) is in the nature of a proviso. Provisoes are often inserted at the instance of apprehensive persons: *West Derby Union v. Metropolitan Life Assurance Society* (2). It is even easier to see that there may be an unnecessary saving clause where the Crown was the party whose rights it was thought necessary to except: *The Brabo* (3). It is not necessary to infer that something is not intended to be protected merely because it is not expressly included in the express protection of a saving clause.

McVeigh K.C. and *Bready* for the respondent. It would be difficult to find a more relevant authority on this case than *Thomas v. Pritchard* (4). It is the particular officer and not the commissioners who is the party in the proceedings. There is nothing unworkable in an officer giving a recognizance to prosecute an appeal with diligence. Once it is clear that the Crown prerogative as to costs is interfered with there is no reason why costs should not have to be secured in the ordinary way. On the question of whether a customs officer may be exempt as being a public authority there is no particularly useful decision on what is meant by the term "public authority." All the decisions are under the Public Authorities Protection Act. In ordinary parlance a customs officer would certainly not be described as a public authority. It is to be noted that the words "public" "authority" in the sub-section appear in juxtaposition with the words "local authority" which undoubtedly mean a body of persons. The exemption of public authorities does not apply to a servant performing the duties of an authority. If the argument that a

(1) [1947] A.C. 58.
(2) [1897] A.C. 647,656.
(3) [1949] A.C. 326.
(4) [1903] 1 K.B. 209.

Crown servant acting on Crown business cannot enter into a recognizance with the Crown is correct, why should it have been found necessary to make express provision for the exemption of police officers and constables ?

Cur. adv. vult.

LORD MACDERMOTT C.J. : This appeal arises out of proceedings brought against the respondents at petty sessions by George G. Dixon, an officer of customs and excise (hereinafter called " the appellant "), on the order of the Commissioners of Customs and Excise. Two summonses were issued, one alleging a breach of section 186 of the Customs Consolidation Act, 1876, in respect of certain prohibited goods, the other a breach of an order made under section 3 (1) of the Import, Export and Customs Powers (Defence) Act, 1939, in respect of the same goods. The resident magistrate dismissed both summonses. The appellant appealed to quarter sessions under section 24 of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935 (hereinafter called " the Act of 1935 "), but did not enter into any recognizance as provided for by sub-section (3) (*c*) of that section. The learned county court judge held that because of this omission he had no jurisdiction to hear the appeals. The question now is whether this decision was right. It was conceded that, when sub-section (3) (*c*) of section 24 does apply to an appeal, compliance therewith is a condition precedent to its hearing and determination at quarter sessions, and the net point accordingly is whether sub-section (3) (*c*) applies to appeals brought by an officer of customs and excise in cases such as the present.

For the appellant it was submitted that sub-section (3) (*c*) did not apply, and that for two reasons. First, it was said that in his capacity as a complainant he was acting for and on behalf of the Crown and so was not bound by paragraph (*c*) ; and secondly, it was argued that the appellant was a " public authority " within the meaning of paragraph (*n*) of the same sub-section and was, therefore, excepted from the provisions

of paragraph (*c*). It will be convenient to deal with these submissions in the order stated.

The first was based on the general rule that the Crown is not bound by the provisions of a statute unless referred to directly or by necessary implication. Now I think it is clear that, when the Act of 1935 was passed on July 16, 1935, section 24 did not apply to proceedings under the Customs Acts of the kind now in question. The legislative powers of the Parliament of Northern Ireland did not extend to such proceedings, and section 42 of the Petty Sessions (Ireland) Act, 1851, remained unrepealed. But by sub-section (1) of section 34 of a United Kingdom statute, the Finance Act, 1935, which (by virtue of S. R. & O. No. 1159 of 1935, made under sub-section (6) of that section) came into operation on January 1, 1936, section 42 of the Act of 1851 was repealed and it was enacted that the Summary Jurisdiction Acts (Northern Ireland)—an expression so defined as to include section 24 of the Act of 1935—should "notwithstanding any special "provisions to the contrary contained in any enact-"ment relating to His Majesty's revenue under the "control of the Commissioners of Inland Revenue or "the Commissioners of Customs and Excise, apply to "all informations, complaints, and other summary "proceedings in Northern Ireland under or by virtue "of any such enactment : . . ."

Prima facie, then, section 24 has been made applicable by express enactment to the summary proceedings brought by the appellant against the respondents. This, indeed, is conceded by the appellant up to a point. He claims under sub-section(1) the right to appeal from a dismiss and he admits that to exercise that right he must comply with the provisions of paragraphs (*a*) and (*b*) of sub-section (3). But he contends that different considerations apply to paragraph (*c*). That paragraph, he says, cannot bind the Crown. The Crown cannot enter into a recognizance with itself, and therefore he, as representing the Crown and suing on its behalf, ought not to be held subject to the requirements of paragraph (*c*).

Having regard to the terms of section 34 (1) of the Finance Act, 1935, it seems to me impossible to support an argument of this nature merely by resort to the rule of construction respecting the immunity of the Crown to which I have referred : see *Thomas v. Pritchard* (1), a decision which is much in point on this particular aspect. If the appellant is to succeed on this branch of the case it must, I think, be on the much narrower ground that section 34 (1) is to be read as applying only what is capable of application, and that paragraph (*c*) of section 24 (3) is not capable of application to the proceedings in question.

Now it may be that all the provisions of the Summary Jurisdiction Acts (Northern Ireland) are not capable of being applied to summary proceedings under the Customs Acts, and that section 34 (1) should be construed so as to allow for this and as though its opening words ran : " The Summary Jurisdiction Acts (Northern " Ireland) shall in so far as they are applicable and " notwithstanding . . ." I do not need to decide that, but I shall so assume in the appellant's favour. And I shall also assume, again without expressing any opinion on the point, that the process of entering into an enforceable recognizance may, for certain emanations of the Crown, be impossible in point of law, or at least highly anomalous. But, even on these assumptions, the question remains whether there is any sound ground for holding that paragraph (*c*) of section 24 (3) should not apply to the appellant as an officer of Customs and Excise. No doubt he sues on behalf of the Crown ; but he does not shed his own personality in the process. He is the complainant, he lays the information and puts the proceedings in motion. I can see no reason why he should not enter into a recognizance. There seems to be nothing anomalous or incongruous about his doing so. He acts on the orders of the Commissioners and as a servant of the Crown, but that does not prevent him from binding himself in the manner contemplated by paragraph (*c*). The obligation to be assumed there-

(1) [1903] 1 K.B. 209.

under is such as to accord with his duty as an appellant and presents no technical difficulty that I can discern.

This brings me to the appellant's second submission. By paragraph (*n*) of sub-section (3) of section 24 the provisions of that sub-section as to entering into a recognizance are not to apply " where the appellant is " a police officer or constable and is appealing by " virtue of any powers given to him as such police " officer or constable, or where the appellant is a " public or local authority." It was not suggested that the appellant here is a " local authority." But is he a " public authority " within the meaning of this enactment ? If so, the learned county court judge was wrong and the appeal must succeed.

I think there is great difficulty in saying what exactly is meant by the expression " public authority " in this context, and I do not intend to attempt a definition. Reference was made to certain decisions on the Public Authorities' Protection Act, 1893, but the terms of that measure, despite its title, are such that these decisions give little guidance on this matter, and I have not found anything more useful elsewhere in the reports. As at present advised, I am not inclined to accept the view, submitted on behalf of the respondents, that " public authority " connotes a corporation aggregate to the exclusion of a natural person ; nor do I favour the contention, advanced on behalf of the appellant, that a person who is not a " public authority " before appealing under section 24 may become such on appealing if the appeal is brought in discharge of a public duty. I think the expression must be taken to refer to the permanent, or at any rate the pre-appeal, status of the appellant, and not as depending upon the nature of the proceedings. I also think that one must distinguish between those who are merely officials or functionaries on the one hand, and the authority, be it public or local, whose servants they are, on the other. In the absence of special circumstances the former, in my opinion, fall outside the expression " public authority." That view seems to me to find support in paragraph (*n*) itself, for

the specific exception in favour of a police officer or constable acting by virtue of powers given him as such is a strong indication that a police officer or constable, even when so acting, was not considered to be "a public or local authority." But apart from that, and whatever the precise content of the phrase may be, I think it would be contrary to the ordinary use of the English language to speak of, say, a policeman or a civil servant as a "public authority." I see nothing in the context to oust this simple, if negative, test. It may well be that the Commissioners of Customs and Excise are themselves a "public "authority," but I do not think it would occur to anyone so to describe an officer of Customs and Excise such as the appellant, and if that is right I think it is impossible to hold that paragraph (*n*) speaks differently and so as to confer the exemption now claimed.

For these reasons I am of opinion that the learned county court judge was right, and that the question submitted should be answered in the affirmative. The appeal must, therefore, be dismissed with costs, which will be measured at the sum of twenty-five guineas.

PORTER L.J. : I concur.

BLACK L.J. : I concur also.

Appeal dismissed.

Solicitor for the appellant : *Chief Crown Solicitor.*

Solicitor for the respondents : *J. G. Lennon.*

S. M. M.

McSTEEN v. McCARTHY (1).

Insurance Motor car Third party liability—Policy excepting (a) injury to any person in the employment of the insured arising out of and in the course of his employment, (b) injury to any person being carried in or upon a vehicle other than a person carried by reason of or in pursuance of a contract of employment—Insured's employee injured when travelling back from work in vehicle for his own convenience—Liability of insurer.

An employer who owned a lorry used in his business was insured in respect of that vehicle under a policy which excepted from liability to third parties "(*b*) death of or bodily injury to any person in the "employment of the insured arising out of and in the course of his "employment, (*c*) death of or bodily injury to any person (other "than a person carried by reason of or in pursuance of a contract of "employment) being carried in or upon . . . such vehicle." When the lorry was returning with tools and equipment from a particular job it was involved in an accident and an employee travelling thereon was injured. This employee was not required to travel on the lorry but he was entitled so to do.

Held, that the injury to the employee did not arise out of and in the course of his employment, but that the employee was being carried as a passenger by reason of or in pursuance of a contract of employment.

Dictum of Lord Wright in *Izzard v. Universal Insurance Co. Ltd.* [1937, A.C. 773 followed.

MOTION for an order under s. 18 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934.

The facts sufficiently appear in the judgment.

Agnew K.C. and *Wilson* for the plaintiff.
Jones K.C., and *Lowry* for the insurers.

Cur. adv. vult.

LORD MACDERMOTT C.J.: The plaintiff, who has obtained judgment against the defendant for the sum

(1) In the King's Bench Division before Lord MacDermott C.J., November 9, 16, 1951.

of £186 4*s*. 0*d*. for damages in respect of injuries sustained in a motor accident, together with costs, subsequently taxed at £102 7*s*. 7*d*., now seeks an order under section 18 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934, against the insurer concerned, namely, the Zurich General Accident and Liability Insurance Company Limited.

The only question arising for decision is whether the defendant Daniel McCarthy, the owner of the vehicle involved in the accident, is covered, in respect of this liability, by the exhibited policy which was issued to him by the insurer for the purpose of Part II of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930.

The defendant was in business in Belfast as a house repairer at and prior to the date of the accident, which occurred on July 16, 1949. The plaintiff was in his employment. On July 12, 1949, the defendant, with the plaintiff and one or two others, left Belfast to do a job at Ballinderry. They travelled in the defendant's lorry which had also on board the necessary tools and equipment. The party remained at Ballinderry until the work was finished on July 16, and were on the return journey home when the accident happened.

The case for the insurer was based on two exceptions in the policy concerning third party liability. They read :—

" The Company shall not be liable in respect of—

" (*b*) death of or bodily injury to any person in " the employment of the insured arising out " of and in the course of such employment.

" (*c*) death of or bodily injury to any person " (other than a passenger carried by reason " of or in pursuance of a contract of em- " ployment) being carried in or upon or " entering or getting on to or alighting from " such vehicle at the time of the occurrence " of the event out of which any claim arises."

For the insurer it was contended, first, that the case fell under exception (*b*), as the plaintiff's injury arose

out of and in the course of his employment by the defendant ; and secondly, that if that were not so exception (*c*) applied, as the plaintiff was not a passenger carried on the lorry " by reason of or in pursuance of a " contract of employment." This second contention was founded on two grounds. It was said that the plaintiff was not in the employment of the defendant at the material time, and secondly that even if he were he was not a passenger on the vehicle by reason of or in pursuance of a contract of employment.

The plaintiff, who had sworn an affidavit in support of the motion, gave viva voce evidence, and was examined and cross-examined by counsel. His was the only material testimony, and on it I have no doubt that at the time of the accident he was employed by the defendant. The work in question took place in a recognised holiday period, and the plaintiff had got his holiday pay before that work started. But I accept his testimony that he continued in the employment and at work up to and including July 16, and that the defendant recompensed him for the extra service thus rendered.

I am also satisfied, on the evidence, that the plaintiff was under no obligation to go back to Belfast on the defendant's lorry, as he did. The plaintiff had brought his bicycle with him to go out on in the evenings while the work was on hand, and he was quite free to return to Belfast by his bicycle if he wanted to, or by using the local 'bus service. But I also find that though the plaintiff was not obliged to travel back on his employer's lorry he was entitled to do so if he wished. As one would expect there was no formal agreement entered into about this, but the plaintiff, as the defendant must have known, lived in Belfast and I am satisfied it was understood between them when the plaintiff agreed to do this holiday work that he would be allowed to travel back in the defendant's lorry when the job was finished and the tools and gear were being taken away.

On these findings I am of opinion that the plaintiff's injuries did not arise out of and in the course of his

employment. I need add no more about this aspect of the case than to say that to hold the contrary would, I think, be to disregard the decision of the House of Lords in *St. Helens Colliery Co. Ltd. v. Hewitson* (1). Exception (*b*) does not, therefore, assist the insurer.

I am also of opinion that the plaintiff's right to travel back on the lorry cannot be dissociated from his employment and that he was " a passenger carried by " reason of or in pursuance of a contract of employ- " ment " within the meaning of exception (*c*). Several phrases used by Cassels J. in *Baker v. Provident Accident and White Cross Insurance Co. Ltd.* (2) were cited on behalf of the insurer, but the facts of that case were very different and I do not think the learned judge intended to state any proposition which would be adverse to the plaintiff in this case. In *Izzard v. Universal Insurance Co. Ltd.* (3) the House of Lords held concerning a clause identical with exception (*c*) that the part thereof in parenthesis was not to be construed as applying only to a person in the employment of the insured. The point in issue here was not the subject of decision in that case, but it seems to have been accepted without question that the employee Izzard, who was killed in the accident, was, on the facts, a passenger carried by reason of or in pursuance of his contract of employment, it being a term of that employment that the lorry to which the accident happened should be at his disposal when going home. In the course of his speech Lord Wright says (4): " A further illustration which comes under the same " category is that of an employee or employees of the " owner of the goods which are being carried, who go " out on the lorry with the goods and return home in the " lorry after the goods are delivered. Such employees " may properly be regarded as passengers carried in " pursuance of a contract with someone other than " the insured person." If that is so, and if Izzard fell within the parenthesis of the relevant clause of the policy in that case, I am unable to distinguish the

(1) [1924] A.C. 59.
(2) [1939] 2 All. E. R. 690.
(3) [1937] A.C. 773.
(4) Ibid 783.

present case or to see why the plaintiff should not be regarded as coming within the parenthesis in exception (*c*) of the present policy.

I should add that the decision of Branson J. in *Wyatt v. Guildhall Insurance Co. Ltd.* (1) was also relied upon by the insurer as going to show that the parenthesis in exception (*c*) should be read as relating only to passengers carried normally or habitually by reason of or in pursuance of a contract of employment. I do not find it necessary to discuss that decision. It relates solely to the extent of the cover required by the statute and does not, in my view, afford any material assistance on the correct interpretation of exception (*c*).

On these grounds I am of opinion that the present application ought to succeed. I order, accordingly, that the insurer pay the amount of the said judgment and costs. The insurer must also pay the costs of this application when taxed.

Order granted.

Solicitors for the plaintiff: *N. & F. Tughan and Walmsley.*

Solicitor for the insurers: *Henry J. Catchpole.*

J. P.

(1) [1937] 1 K.B. 653.

McMANUS v. ARMAGH COUNTY COUNCIL AND LURGAN BOROUGH COUNCIL (1).

Criminal injury—Death arising out of unlawful assembly—Conviction of manslaughter—Power of court to make a finding of murder—Compensation to representatives of person murdered—Criminal Injuries (Ireland) Act, 1919 (9 & 10 *Geo.* 5, *c.* 14), *s.* 1 (1) (*b*)—*Law Reform (Miscellaneous Provisions) Act (Northern Ireland)*, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 9), *s.* 14.

Where a person has been killed in circumstances constituting an unlawful assembly and the assailant has been convicted of manslaughter, a court which subsequently entertains proceedings for compensation under the Criminal Injuries Code is not bound by the conviction but may find on the evidence that the deceased was murdered.

Proceedings for compensation in respect of criminal injuries are not actions in personam and accordingly are not affected by the common law maxim *actio personalis moritur cum persona*, nor are they affected by s. 14 of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937.

APPEAL from the decision of the County Court Judge of Armagh making an award of compensation for criminal injury.

On September 21, 1951, Brian McManus was attacked with a croquet mallet and died as a result of a blow on the head. His assailant, William John McCann, was subsequently arraigned at the Winter Assizes held at Downpatrick in December, 1951, on a charge of murder. At this trial he was found not guilty of murder but was convicted of manslaughter.

At Lurgan Quarter Sessions held on April 17, 1952, Margaret McManus, the widow and personal representative of the deceased, made an application under section 1 (1) (*b*) of the Criminal Injuries (Ireland) Act, 1919, for compensation for the death of her husband both on her own behalf and on behalf of her children.

The county court judge held that there had been an unlawful assembly, that he was entitled to find that the deceased had been murdered notwithstanding the

(1) At Armagh Assizes before Curran J., July 17, 30, 31, 1952.

outcome of the proceedings at the assizes, and that accordingly the application came within section 1 (1)(*b*) of the Criminal Injuries (Ireland) Act, 1919 (1), and made an award of £2,000 to be levied on the Lurgan Borough District.

McVeigh Q.C. and *Staunton* for the applicant.

Agnew Q.C. and *Bready* for the Lurgan Borough Council.

Kelly for the Armagh County Council.

Cur. adv. vult.

CURRAN J.: I need not reiterate the evidence in this case. The material facts have been clearly established. The first matter I have to consider is whether, on those facts, this case comes within section 1 (1) (*b*) of the Criminal Injuries (Ireland) Act, 1919, as amended by section 7 (*a*) of the Criminal Injuries (Ireland) Act, 1920, it being contended on behalf of the applicant and respondent that her husband, Brian McManus, was murdered and that such murder was a crime arising out of an unlawful assembly. The evidence before me as to what took place immediately preceding the assault resulting in Brian McManus's death in my opinion clearly establishes the applicant's case and I have no hesitation in finding that Brian McManus was murdered in circumstances which bring this within section 1 (1) (*b*) of the 1919 Act.

The only question remaining for consideration is as to the amount of compensation. It is not sufficient for me to take the amount awarded by the county

(1) By the Criminal Injuries (Ireland) Act, 1919, s. 1 (1) (*b*), as amended by the Criminal Injuries (Ireland) Act, 1920, s. 7:

Section 1—

(1) "The provisions of the "Criminal Injuries Acts with "respect to the compensation "of persons maimed and of the "representatives of persons mur- "dered in certain cases, shall, "subject to the modifications "made by this section, be ex- "tended so as to apply in any of "the following cases, namely:—

(*a*) . . . . . .

(*b*) "Where any other person "has been murdered, maimed, "or maliciously injured in his "person, and the murder, maim- "ing or injury is a crime arising "out of any combination of a "seditious character or any un- "lawful association or assembly."

court judge and to say whether or not I consider it reasonable. I must consider all the circumstances and make an independent assessment.

The assessment of the amount of compensation in a case like this is very difficult. There are many considerations to be taken into account, and one has to ensure, as far as possible, that, having regard to those considerations, full compensation is awarded. Doing the best I can I have come to the conclusion that the amount of compensation should be £2,700. I apportion this sum as follows :—£1,600 to the applicant, £500 to her elder daughter Katherine Margaret and £600 to her younger daughter Jill Rosemary.

In the course of his argument on behalf of the respondents and appellants Mr. Agnew contended that the evidence did not warrant an award of compensation; and further that if, as he submitted, murder was not established, and it were established that Brian McManus had been maimed or maliciously injured within the meaning of section 1 (1) (*b*) of the 1919 Act, the right to claim compensation under the Act did not survive. If it did not survive, Mr. Agnew contended, the claim could only be brought under section 14 of the Law Reform (Miscellaneous Provisions) Act, 1937, and the applicant could only recover in respect of funeral expenses, pain and suffering, and loss of expectation of life.

I am of opinion that the provisions of section 14 of the 1937 Act apply only to actions in personam, and that proceedings for an award of compensation under the Criminal Injuries Code are not of that nature. It follows that the Common Law maxim *actio personalis moritur cum persona* has no application to such cases, nor has section 14 of the 1937 Act.

Appeal dismissed : award varied.

Solicitor for the applicant : *J. P. McConville.*

Solicitor for the Lurgan Borough Council : *W. J. Neill.*

Solicitor for the Armagh County Council : *H. A. Emerson.*

S. M. M.

ANTRIM COUNTY COUNCIL v. HARKNESS (1).

Summary jurisdiction—Limitation of time—Recovery of arrears due under contribution order—Petty Sessions (Ireland) Act, 1851 (14 & 15 *Vict., c.* 93), *s.* 10 (4)—*Summary Jurisdiction (Separation and Maintenance) Act (Northern Ireland)*, 1945 (9 & 10 *Geo.* 6, *c.* 14), *s.* 6 (1)—*Children and Young Persons Act (Northern Ireland)*, 1950 (13 & 14 *Geo.* 6, *c.* 5), *ss.* 128, 132.

In proceedings for the enforcement of a contribution order made under sections 121 and 122 of the Children and Young Persons Act (Northern Ireland), 1950, only those arrears of payment can be recovered which accrued during the six months immediately preceding the complaint.

CASE STATED by the Resident Magistrate sitting at Ballycastle Petty Sessions.

On January 22, 1951, a court of summary jurisdiction in the Petty Sessions District of Ballycastle committed a son of the respondent to a training school under Part III of the Children and Young Persons Act (Northern Ireland), 1950, and, pursuant to the powers conferred by sections 121 and 122 of the said Act, ordered the respondent to pay the appellant a weekly sum of 5*s.* 0*d.* as a contribution in respect of his said son during the period of the latter's detention. The respondent made default in paying the contributions thus ordered and on January 24, 1952, when the arrears amounted to £13, the appellant brought proceedings to enforce the said order under sub-section (8) of section 122. These proceedings were initiated by an information sworn by the appellant's secretary and the complaint so made came on for hearing on February 25, 1952, at a court of summary jurisdiction sitting at Ballycastle. At the hearing the resident magistrate held that the application was subject to the provisions of section 10 (4) of the Petty Sessions (Ireland) Act,

(1) In the Queen's Bench Division before Lord MacDermott C.J. and Black L.J.; June 12, July 29, 1952.

1851 (1), and that the appellant could only recover the arrears of contribution which had accrued during the six months immediately preceding the complaint. He accordingly made an order in respect of the sum of £6 10*s*. 0*d*. instead of the said sum of £13 and, on the admission of the respondent that no sufficient distress could be had, he directed that the respondent be committed to prison for four weeks unless the said sum of £6 10*s*. 0*d*., with a further sum of £2 8*s*. 0*d*. for costs, was sooner paid and satisfied.

The question raised by the case stated was whether the resident magistrate was right in holding that section 10 (4) of the Act of 1851 was applicable.

McVeigh Q.C. and *Watt* for the appellant :—

Section 122 (8) of the Children and Young Persons Act (Northern Ireland), 1950, incorporates the provisions of section 6 of the Summary Jurisdiction (Separation and Maintenance) Act, 1945, and consequently section 6 of the latter Act must automatically

(1) By the Petty Sessions (Ireland) Act, 1851, s. 10 :

" Whenever Information shall " be given to any Justice that " any Person has committed or " is suspected to have committed " any Treason, Felony, Misdemeanour, or other Offence, " within the Limits of the Jurisdiction of such Justice, . . .; " or whenever a Complaint shall " be made to any Justice as to " any other Matter arising within " the Limits of his Jurisdiction, " upon which he shall have Power " to make a Summary Order, it " shall be lawful for such Justice " to receive such Information or " Complaint, and to proceed in " respect to the same, subject to " the following Provisions :—

. . . . . .

(4) " In all cases of Summary " Jurisdiction the Complaint " shall be made, when it shall " relate to the Nonpayment of " any Poor Rate, County Rate, " or other public Tax, at any " Time after the Date of the " Warrant authorizing the " Collection of the same, and " when it shall relate to the " Nonpayment of Money for " Wages, Hire, or Tuition, " within One Year from the " Termination of the Term or " Period in respect of which it " shall be payable, and when it " shall relate to any Trespass, " within Two Months from the " Time when the Trespass shall " have occurred, and in any " other Case within Six Months " from the Time when the " Cause of Complaint shall have " arisen, but not otherwise."

be applied: *Reg. v. Surrey JJ.* (1); *Magherafelt Guardians v. Gribben* (2); *Bradlaugh v. Clarke* (3).

Even if section 13 (1) (*a*) is not directly applied it is necessary to have regard to it in the interpretation of section 6.

Even on the terms of section 6 itself it is clear that the legislature did not intend a time limit to apply. It contains no restriction on the words "at any time" and "any sum appearing to be due": *Weightman v. Weightman* (4); *Natborny v. Natborny* (5).

The respondent did not appear and was not represented.

Cur. adv. vult.

LORD MACDERMOTT C.J. stated the facts and continued:—

The point raised in the case, though short, is not without difficulty and necessitates the citation of a series of enactments.

Section 10 (4) of the Act of 1851 (with the omission of all words relating to complaints of a kind with which this appeal is not concerned) reads thus—"In "all Cases of Summary Jurisdiction the Complaint shall "be made . . . within Six Months from the Time when "the Cause of Complaint shall have arisen but not "otherwise."

Section 122 (8) of the Act of 1950 provides as follows:—"A contribution order may be enforced in "like manner as an order made under the Summary "Jurisdiction (Separation and Maintenance) Act "(Northern Ireland), 1945, for the payment of any "weekly or other sum, and accordingly the provisions "of section six of that Act shall apply to the enforce-"ment of a contribution order: . . ."

Section 132 of the same Act reads thus—"Subject "to the provisions of this Act, all orders of a court of "summary jurisdiction under this Act shall be made,

(1) (1869) L.R. 5 Q.B. 87.
(2) (1889) 24 L.R. Ir. 520.
(3) (1882) 8 App. Cas. 354.
(4) (1906) 22 T.L.R. 362.
(5) [1933] P. 1.

" and all proceedings in relation to any such orders " shall be taken, in manner provided by the Summary " Jurisdiction Acts (Northern Ireland)."

Sub-section (1) of section 6 of the Summary Jurisdiction (Separation and Maintenance) Act, 1945, provides that where an order for the payment of a weekly or other sum has been made under that Act and there is default in such payment " a resident " magistrate or justice of the peace may, at any time " after the expiration of fourteen days from the date " of such default, issue a summons for the appearance " of the person by whom such payments are to be " made before a court of summary jurisdiction acting " for the same petty sessions district as the court " which made the order . . ." ; and the sub-section then proceeds to enact that such court may (*a*) " by " order direct that any sum appearing to be due . . . " shall be recovered by distress . . .", and (*b*) " order " that such person be detained and kept in custody . . . " until return can be conveniently made to such " warrant of distress " unless sufficient security is forthcoming.

Sub-section (2) of the same section provides that if no sufficient distress can be had the court may issue a warrant committing to prison the person from whom the payment is due " for any term not exceeding three " months unless such sum and costs, and all reasonable " charges attending the distress (if any) be sooner paid " and satisfied."

Sub-section (4) of section 6 is in these terms : " Where, on an application for the enforcement of " payment of any sum due under an order made " under this Act or under any enactment repealed by " this Act, no warrant of commitment to prison is " issued, the application may be renewed at any time " on the ground that the circumstances of the person " from whom the payment is due have changed."

Section 13 (1) of the Act of 1945 enacts that " The " provisions of the Summary Jurisdiction Acts (North- " ern Ireland) shall, except as otherwise expressly " provided in this Act, apply with respect to the issue

" and service of any warrant or summons, the hearing " of any case, the making of any order or of any appeal " therefrom and the taking of any proceedings by or " before a court of summary jurisdiction for the pur- " poses of this Act : Provided that—

" (*a*) the provisions of section ten of the Petty " Sessions (Ireland) Act, 1851, relating to the " time within which summary proceedings " may be commenced shall not apply to pro- " ceedings for enforcement of the payment of " sums adjudged to be paid by an order made " under this Act or any enactment repealed " by this Act ;

. . . . . .

" (*d*) no appeal shall lie against an order made " under sub-section (1) of section six of this " Act."

If sub-section (8) of section 122 of the Act of 1950 had not gone further than to provide that a contribution order might be " enforced in like manner " as an order made under the Act of 1945, I think it would have been at least doubtful whether the limitation imposed by section 10 (4) of the Act of 1851 would have been excluded. Though that limitation does not apply to proceedings for enforcement of payments ordered under the Act of 1945, section 132 of the Act of 1950 would seem, prima facie, to apply it to proceedings under that Act and I am not clear that the words " enforced in " like manner " in section 122 (8) are sufficient to enact the contrary. I think these words, when read as part of the text of the Act of 1950, may fall short of connoting a procedure which is not only similar but identical to the extent of not being subject to the usual period of limitation.

Sub-section (8), however, goes on to add this provision :- " and accordingly the provisions of section six " of that Act (the Act of 1945) shall apply to the " enforcement of a contribution order." Now, that addition seems to me to increase, rather than diminish, the doubt to which I have just referred. Section 6 of

the earlier Act contains no express reference to section 10 (4) of the Act of 1851. If sub-section (8) of section 122 had also made reference to section 13 (1) (*a*) of the Act of 1945 the matter would have been plain and no question could have arisen ; but it seems to me that the fact that the reference is to section 6 alone and without any mention of section 13 puts a further difficulty in the appellant's way.

Counsel for the appellant sought to dispel these difficulties by two submissions. In the first place, they contended that the terms of section 6 of the Act of 1945 were, in themselves, sufficient to exclude section 10 (4) of the Act of 1851. In this connection reliance was placed upon three expressions which occur in section 6. Under sub-section (1) the resident magistrate may issue a summons " at any time " after the expiration of fourteen days from the date of default, and may direct that " any sum appearing to " be due " shall be recovered by distress. Then, under sub-section (4), where an application for enforcement does not result in committal, the application " may be " renewed at any time " on the ground that there has been a change in the circumstances of the person in default. These expressions, it was said, were incompatible with a limitation period of six months. This argument is perhaps at its height in relation to the wording of sub-section (4), for it must be admitted that that sub-section, as well as using the words " at " any time," contemplates a series of events which might easily span a considerable period. It speaks of a situation in which a payment has fallen due and has not been paid, in which enforcement proceedings have been taken and have proved abortive, and in which, subsequently, there has been a change in the circumstances of the defaulter. But without wishing to deny this submission some degree of cogency, I doubt if it is sufficient to exclude section 10 (4) of the Act of 1851. I think each of the three expressions relied upon is capable of being read as subject to the general period of limitation laid down by that enactment, and it seems to me that support for this view may be found in the fact that the Legislature thought fit to exclude

that period expressly by section 13 (1) (*a*). I do not think it ought readily to be assumed that that provision was superfluous or inserted merely as a matter of caution.

The next submission on behalf of the appellant was to the effect that the application of section 6 of the Act of 1945 by sub-section (8) of section 122 of the Act of 1950 also involved the application of section 13 (1) (*a*) of the former Act. As section 6 is not, as respects the Act of 1945, subject to the limitation imposed by section 10 (4) of the Act of 1851, it ought not, the argument ran, to be subject to that limitation when made use of for the purposes of section 122 of the Act of 1950.

I am not disposed to accede to this submission. I think the referential effect of sub-section (8) of section 122 is at its height if the full terms of section 6 of the Act of 1945 are taken as incorporated; but I am not aware of any canon of construction which justifies the general proposition that if one statute expressly incorporates a specific part of another statute, the incorporated part brings with it all the other provisions of its statute which may affect or modify it. Section 6 is, on the views already expressed, capable of being put into operation either with section 10 (4) of the Act of 1851 or with section 13 (1) (*a*) of the Act of 1945, and I cannot but feel that if the Legislature had intended section 13 (1) (*a*) to apply it would have so provided in plain terms.

I find some support for this conclusion in considering proviso (*d*) of section 13 (1). If the appellant's contention is well founded it would seem that this proviso also should be read into, or incorporated with, sub-section (1) of section 6, so that, notwithstanding the terms of section 132 of the Act of 1950, the right of appeal of a defaulter under that Act against an order for distress, or detention pending the return of the warrant of distress, would be abrogated. But there is nothing that I can discern in the language of section 6 or of sub-section (8) of section 122 to hint at

that or to suggest an intention to curtail the right of appeal.

On any view, the machinery for the enforcement of a contribution order under the Act of 1950 may lead to drastic measures involving personal liberty. No doubt the court is granted a wide discretion, but the fact remains that, once default has been made, it is given power to commit the defaulter to gaol for a term not exceeding three months or until the sum due, with costs, is sooner paid. The period of his incarceration may therefore be determined by the defaulter's capacity to pay, and that capacity may well depend on the amount which he has to find. If there is no limitation of time this may be much more substantial than if the period of six months is applicable. Putting the appellant's case at its highest, it seems to me that the meaning of the relevant legislation is, at least, ambiguous. That being so, and the liberty of the subject being more adversely affected by one view than the other, I think the matter ought to be resolved in favour of the defaulter. As Lord Simonds said in *London and North Eastern Railway Co. v. Berriman* (1), " a man is not to be put in peril upon an ambiguity, " however much or little the purpose of the Act appeals " to the predilection of the court."

For these reasons, I am of opinion that the resident magistrate was right and that the question submitted in the case stated should be answered in the affirmative.

BLACK L.J.: I agree.

Appeal dismissed.

Solicitor for the appellant: *Samuel Anderson.*

S. M. M.

(1) [1946] A.C. 278, 313.

McCANN v. BELFAST CORPORATION AND OTHERS (1).

Practice—Payment out of court—Money lodged to credit of widow under Fatal Accidents Acts, 1846-1908—*Power of court to control funds—R. S. C. Or.* 22, *r.* 8 (7).

The High Court has no jurisdiction by virtue of the Judicature Act (Ireland), 1877, or otherwise, to retain or control money lodged in court to the separate credit of a widow who is of full age and otherwise sui juris. Accordingly Order 22, rule 8 (7) is ultra vires in so far as it purports to empower the court to withhold money recovered by or adjudged to be paid under the Fatal Accidents Acts, 1846—1908, to the widow of the person killed.

Motion for an order for payment out of funds in court.

The plaintiff as administratrix of Gerald Mallon, deceased, brought an action under the Fatal Accidents Acts, 1846-1908, on behalf of the widow and child of the deceased for damages for the death of the deceased resulting from a street accident. The widow was a minor at the time when the action was commenced. The action was settled and, a sum of money was paid into court by the defendants, and part of this sum was placed to the separate credit of the widow who was by that time of full age.

The widow now applied for an order that the whole of the amount standing to her separate credit be paid over to her. The motion was first made ex parte before Curran J. who ordered it to be reargued before a Divisional Court on notice to the Attorney-General.

Appleton for the applicant.

Lowry for H. M. Attorney-General as amicus curiae.

Cur. adv. vult.

Lord MacDermott C.J.: In this action Mrs. Philomena Mallon, the present applicant, recovered damages under the Fatal Accidents Acts, 1846 to 1908,

(1) In the Queen's Bench Division before Lord MacDermott C.J., Porter L.J. and Curran J.; Feb. 6, 18; May 9, 1952.

for the death of her husband Gerald Mallon who was fatally injured in a street accident in Belfast on December 19, 1949. The amount recovered was paid into court and placed to the applicant's separate credit in July, 1951, a few months after she had come of age. Part of the sum thus lodged was subsequently paid out for the applicant's benefit. The order she now seeks is that the balance be paid or transferred to her.

Mr. Appleton, for the applicant, did not base his case on his client's financial requirements. He did not, indeed, ask the court to exercise any discretion it might have in the matter. The essence of his contention simply was that the applicant, being sui juris, was absolutely entitled to receive the money standing to her separate credit, and that if and in so far as Order 22 rule 8, sub-rule (7) purported to empower the court to withhold this money from her it was ultra vires.

Order 22 deals with payment into and out of court and rule 8 is primarily concerned with infants and persons of unsound mind. Sub-rule (2) of that rule provides :—

> " No money . . . in any way recovered . . . in " respect of the claims of any such infant or person " of unsound mind . . . shall be paid to the plaintiff " or to the next friend of the plaintiff or to the " plaintiff's solicitor unless the Court or a Judge shall " so direct."

Sub-rules (3) and (4) are concerned with how money so recovered may be dealt with by the court or judge. I need not refer to these two sub-rules at length or further than to say that the wide powers they confer include power to direct that the money recovered be paid into court and applied as the court or judge may think fit for the benefit of the infant or person of unsound mind. The material part of sub-rule (7) of rule 8 reads as follows :

> " The provisions of this rule shall also apply " to all actions in which damages are claimed or " recovered by or on behalf of or adjudged or ordered " or awarded or agreed to be paid to an infant or " person of unsound mind under the Fatal Accidents

"Acts, 1846 to 1908, and also to money which under "those Acts is recovered by or adjudged to be paid "to the widow of the person killed as they apply to "money recovered by or adjudged or ordered to be "paid to an infant."

For the Attorney-General Mr. Lowry, whose assistance as amicus curiae I am glad to acknowledge, submitted that sub-rule (7) might, on its true construction, be read as applying only to such widows (not being infants or persons of unsound mind) as consented to be dealt with thereunder. I am unable to accede to this submission. In my opinion sub-rule (7) was meant to go much further than this. I entertain no doubt that—whatever may be done thereunder by consent—the intention of the sub-rule was to assimilate the position of widows to that of infants and so to confer on the court, inter alia, a discretionary power to retain money recovered by a widow under the Fatal Accidents Acts despite her dissent.

The net point which thus emerges, namely, whether sub-rule (7) is in this respect ultra vires, has not, so far as I can ascertain, been the subject of decision. In England the corresponding provision is sub-rule (9) of rule 14 of Order 22 which is in identical terms. Its competence and the power of the court in that jurisdiction to hold and control a widow's compensation were not challenged and appear to have been accepted without question before Donovan J. and the English Court of Appeal in the recent case of *Taylor (formerly Ryan) v. Cheltenham and Hereford Breweries Ltd.* (1), where the remarriage of a widow was held not to terminate the court's discretionary control over the sum recovered by her under the Fatal Accidents Acts.

In England, however, this power to control a widow's compensation has been attributed to the provisions of section 164 (3) of the County Courts Act, 1934, which replaced section 205 (2) of the Judicature Act, 1925: see The Annual Practice for 1951, Vol. I, p. 406. But in this country we have no enactment similar to this

(1) [1952] 1 All E.R. 1135.

and the prevailing English procedure cannot, therefore, be regarded as necessarily opposed to Mr. Appleton's submission.

Here, the only statutory authority for the provisions of sub-rule (7) is to be found in section 61 of the Supreme Court of Judicature Act (Ireland), 1877, as amended and subsequently adapted for the Supreme Court in Northern Ireland. That section is primarily directed to matters of procedure and there is nothing in it expressly providing for the retention or control of funds belonging to widows who are of full age and otherwise sui juris. Should such provision, then, be implied? The judgments of the English Court of Appeal in *Johnston v. Henry Liston & Co.* (1) and *In re Embleton* (2), though not precisely in point, seem to me to show that implications of this nature ought not to be raised with alacrity. Prima facie it is not the function of the rules of procedure to curtail the ordinary proprietary rights of ordinary people, and I see no trace in section 61 of any intention to depart from this general principle. There would, however, be little difficulty about implying sufficient authority under that section to justify sub-rule (7) in its present form if to be a widow is to be either under some degree of legal incapacity or else subject to the protective control of the court by virtue of some inherent jurisdiction of a paternal or prerogative character. In either such case the rules of procedure might well be expected to recognise widows as persons of special status, just as they make particular provision respecting infants and persons of unsound mind.

But has a widow any special status in this connection? In my opinion this question can only be answered in the negative with the law as it stands in this jurisdiction. Widowhood per se involves no disability and I can find nothing in authority or in the principles upon which our law is founded to lend countenance to the view that the court has any inherent right to control a widow's property against her will and just because she is a widow.

(1) [1920] 1 K.B. 99. (2) [1947] K.B. 142.

If this is the position it seems to me necessarily to follow that sub-rule (7) is ultra vires as respects widows, and that this court has no authority either under it or inherently to refuse this application.

I may add that I have reached this conclusion about the competence of sub-rule (7) with considerable regret. While the drawbacks of continuing a state of pupilage beyond infancy are, in general, weighty, I have no doubt from my own experience that a widow who has obtained compensation under the Fatal Accidents Acts stands often, though by no means always, in real need of the protection of the court.

For the reasons given I am of opinion that the Accountant General must be directed to pay or transfer, as the case may be, to the applicant all that now lies in court to her separate credit.

Porter L.J. : I concur and have nothing to add.

Curran J. : I concur.

Order accordingly.

Solicitor for the applicant : *Anthony Lunn.*

Solicitor for H. M. Attorney-General : *Chief Crown Solicitor.*

J. P.

ROBINSON v. TYRONE COUNTY COUNCIL (1).

Malicious injury—Damage to property—Consequential loss—Assessment of compensation—Malicious Injuries (Ireland) Act, 1853 (16 & 17 *Vict.*, *c.* 38), *s.* 1—*Criminal Injuries (Ireland) Act*, 1919 (9 *Geo.* 5, *c.* 14), *s.* 1 (3)—*Criminal Injuries (Ireland) Act*, 1920 (10 & 11 *Geo.* 5, *c.* 66), *s.* 7 (*b*).

S. 1 of the Malicious Injuries (Ireland) Act, 1853, which provides for the recovery of " all damages " sustained by any person by means of any of the unlawful acts specified in that section is not limited to providing compensation for actual damage done to property but extends to all consequential loss directly resulting therefrom. Moreover, s. 1 (3) of the Criminal Injuries (Ireland) Act, 1919, as extended by s. 7 (*b*) of the Criminal Injuries (Ireland) Act, 1920, which confers power to award " full compensation " for criminal injuries to property, entitles the court to include in its award compensation for consequential loss.

Accordingly where a taxi cab which was engaged in cross-border traffic between Northern Ireland and the Republic of Ireland was damaged maliciously it was *held* that the court could award compensation which included, in addition to the cost of repairing the vehicle, (i) the amount of loss due to loss of use and profit while the vehicle was being repaired, (ii) the amount of additional duty in respect of new parts supplied in the course of repair which the owner would have to pay to re-engage in cross-border traffic.

CASE STATED by Black L.J. sitting as Judge of Assize.

On the evening of July 29, 1951, three soldiers all under the influence of drink took a taxi cab belonging to the applicant and drove it away at high speed and in a reckless manner so that it collided with a lamp standard and was severely damaged.

The applicant claimed compensation under the provisions of s. 5 of the Local Government (Ireland) Act, 1898, or alternatively under s. 1 of the Malicious Injuries (Ireland) Act, 1853, and the county court judge made an award of £550. The County Council appealed to the Judge of Assize and the appeal was heard by Black L.J. who held that liability had been established under the Act of 1853 on the basis that the

(1) In the Court of Appeal before Lord MacDermott C.J., Porter L.J. and Sheil J.; April 21, May 9, 1952.

soldiers were unlawfully assembled together in the commission of various offences against the Road Traffic Acts. He further held that since there was no evidence of ill will towards the applicant the soldiers could not have been convicted on indictment of any offence under the Malicious Damage Act, 1861, and that therefore no liability had been established under s. 5 of the Local Government (Ireland) Act, 1898. He therefore confirmed the award of £550 which was made up as follows :—(*a*) £330 7*s*. 1*d*.—cost of repairs to vehicle ; (*b*) £81 6*s*. 3*d*.—loss of use and profit while the vehicle was under repair ; (*c*) £138 6*s*. 8*d*.—compensation for the fact that by reason of new parts fitted to the vehicle in the course of repair the applicant was obliged to pay additional duty to enable him to make full use of the vehicle for cross-border traffic, as he had hitherto done, or else to restrict the user of the vehicle.

On the application of the County Council Black L.J. stated a case for the opinion of the Court of Appeal. The questions raised by the case stated were :—

(1) Whether, upon the facts, the applicant was in law entitled to recover compensation for damage to his taxi cab either under the provisions of s. 5 of the Local Government (Ireland) Act, 1898, or under the provisions of s. 1 of the Malicious Injuries (Ireland) Act, 1853, and

(2) If the applicant was in law entitled to recover compensation whether the amount of compensation recoverable by him should in addition to the actual expense of having the damage to the vehicle repaired, include also compensation for the loss sustained by him consequential upon that damage under either or both of the heads set out in paragraph 7 of the case.

Paragraph 7 of the case set out the items referred to above relating to the amount of consequential damages claimed.

At the hearing before the Court of Appeal it was conceded on behalf of the County Council that there was liability under s. 1 of the Malicious Injuries (Ireland) Act, 1853, and no further argument was

addressed to the court on the first question raised in the case stated.

Jones Q.C. and *Babington* for the County Council.
Agnew Q.C. and *Higgins* for the applicant.
Cur. adv. vult.

LORD MACDERMOTT C.J. : The genesis of this matter was an incident which took place on July 29, 1949, in Abercorn Square, Strabane. About 10-30 p.m. three soldiers, all under the influence of drink, got into a motor taxi cab, the property of the applicant, and drove off at a very fast speed and in a reckless manner along Bridge Street, with the result that the cab came into contact first with several houses and then with a lamp standard and was severely damaged.

The applicant claimed to be entitled to compensation in respect of this incident under section 5 of the Local Government (Ireland) Act, 1898, or, alternatively, under section 1 of the Malicious Injuries (Ireland) Act, 1853

The county court judge awarded the applicant £550 and on appeal to Assizes Black L.J. affirmed this award holding that liability had been established under section 1 of the Act of 1853, though not under section 5 of the Act of 1898. Then, on the application of the County Council, he stated this case, submitting two questions of law for the consideration and determination of this court.

The first, and as I venture to think the more important, of these questions asks whether, upon the facts, the applicant was in law entitled to recover under one or other of the enactments I have mentioned. This, however, is no longer a live issue between the parties as, upon the appeal coming on for hearing in this court, the County Council admitted liability under section 1 of the Act of 1853 and the applicant admitted that his right to compensation arose under that section and not under section 5 of the Act of 1898. I accordingly turn to the second question, assuming for the purpose, but without deciding or expressing any view

on the point, that the applicant is in law entitled to recover compensation under section 1 of the earlier Act.

The award of £550 is made up under three heads :—

(i) £330 : 7 : 1, the cost of repairing the damage to the cab ;

(ii) £81 : 6 : 3, the amount of loss sustained by the applicant by being deprived of the use of the cab while it was being repaired ; and

(iii) £138 : 6 : 8, the amount of additional duty in respect of new parts supplied in the course of repair, which the applicant has to pay in order to make as full a remunerative use of the cab for cross-border traffic as he had done before it was damaged.

The second question submitted is concerned solely with the quantum of compensation. What it asks, in effect, is whether the applicant is entitled to either or both of the amounts at (ii) and (iii) above in addition to the amount at (i) about which there is no dispute.

On this question *Noblett v. Leitrim County Council* (1), and numerous other authorities were cited in argument. Most of these will be found conveniently collected in *Nicholson & Morrow Ltd. v. Belfast Corporation* (2)—a decision of Black L.J. when Recorder of Belfast. I do not think it necessary to go through these decisions or to canvass the notable divergence of judicial opinion which they reveal as to the recovery of consequential loss under the malicious injuries code. The point must turn on what the relevant part of section 1 of the Act of 1853 says and on that the cases, with the possible exception of *Leyburn v. Armagh Co. Council* (3), which is clearly distinguishable on its facts, have, as it seems to me, little to offer.

Section 1, after specifying the unlawful acts or offences to which it relates, proceeds as follows :—

" . . . all damages which have heretofore been so sus-
" tained or shall at any time after the passing of this
" Act be so sustained, by any person or persons, by
" means of any of such unlawful acts or offences as

(1) [1920] 2 I.R. 143.
(2) [1943] Ir. Jur. R. 26.
(3) [1922] 2 I.R. 58.

" aforesaid, shall and may be recovered . . ." The section then applies the procedure provided by two earlier Acts and continues—" and the provisions of " the said two last-mentioned Acts respectively, as the " case may be, shall be accordingly applied for the " recovery of compensation for damages sustained by " means of any of such unlawful acts or offences. . . ."

For the County Council Mr. Jones contended that the compensation under this enactment was limited to the sum needed to answer or make good the actual damage done to the property in question. While loss under head (i) was, therefore, recoverable, loss under heads (ii) and (iii) was, in his submission, outside the section and irrecoverable.

In my opinion the section is incapable of a construction supporting this contention. The use of the word " compensation " points strongly against the respondents' argument for, in its ordinary meaning, it connotes the provision of an equivalent and is incompatible with a measurement of the loss sustained which leaves out of account items of actual loss that are the direct result of the unlawful act. Here, the loss under heads (ii) and (iii) would undoubtedly fall within the ordinary conception of compensation for there is no suggestion of remoteness and the loss under each is not only the direct but the inevitable consequence of the unlawful act.

Again, it will be observed that the section, in dealing with the recovery of compensation, does not refer to the damage done to the injured property as the yardstick. Instead, it refers to " all damages . . . sus- " tained . . . by any person . . . by means of . . . " such unlawful act. . ." These are apt words to describe the loss, whatever its make-up, which the applicant has sustained as a direct result of what is complained of. What is too remote will, of course, fall outside this, but there is nothing that I can discern in the wording of this legislation to justify the view that all loss consequential upon the actual injury to the property concerned must also be disregarded. The use of the comprehensive plural " all damages "

is significant and, to my mind, altogether inconsistent with that view. It is impossible to think that Parliament would have employed that expression had the intention been to restrict the compensation payable to but a part of the loss sustained as a direct result of the compensatable event.

For these reasons I think the entire amount of the award of £550 is authorised by the terms of section 1 of the Act of 1853. I may add, however, that even if I felt some doubt about this I would, none the less, agree with the sum awarded by the courts below, as I consider the effect of section 1 (3) of the Criminal Injuries (Ireland) Act, 1919, as extended by section 7 (*b*) of the Criminal Injuries (Ireland) Act, 1920, to be that the power to award compensation for criminal injuries to property includes power to make a decree for "full compensation," and as, in this case, nothing short of the £550 could possibly be so described.

I would, accordingly, answer the second of the questions submitted as follows:—

"The amount of compensation recoverable by "the applicant should, in addition to the actual "expense of having the damage to the vehicle "repaired, include compensation for the conse- "quential loss sustained by him under both heads "(*a*) and (*b*) set out in paragraph 7 of the case stated."

The award of the county court judge will, therefore, stand affirmed with costs to the applicant.

PORTER L.J.: No argument was addressed to us on the first question as both parties admitted that the right to compensation arose under section 1 of the Malicious Injuries (Ireland) Act, 1853, and not under section 5 of the Local Government (Ireland) Act, 1898.

With regard to question two, in my opinion the amount of the compensation should include compensation for the loss sustained by the applicant consequential upon the damage to the vehicle.

Before the decision of the Court of Appeal in *Noblett v. Leitrim County Council* (1) different opinions were

(1) [1920] 2 I.R. 143;

held as to whether consequential damages could be included in the compensation. In that case the court (Campbell L.C., Ronan and O'Connor L.JJ.) decided the question in favour of the applicant. It should be observed that this decision was given on February 11, 1919, and that Sir James Campbell L.C., in his judgment uses the words "full amends" and says that compensation should include all loss or damage which is the natural and direct consequence of the wrong done to the applicant.

A little more than two months after that decision—on April 16, 1919, the Legislature passed the Criminal Injuries (Ireland) Act, 1919, which dealt with cases of murder and criminal injuries to the person, and by section 1 (3) empowered the county court judge or the judge of assize to make a decree for "full compensation" in such cases.

This power to make a decree for full compensation was extended to cases of criminal injury to property by the Criminal Injuries (Ireland) Act, 1920, section 7 (*b*).

I think that the use of the words "full compensation" in the Act of 1919, and the subsequent extension of section 1 (3) of that Act to cases of criminal injury to property, were intended to remove all doubts which existed previously to the decision in *Noblett's* case (1) as to whether consequential damages should form part of the compensation.

In my opinion the consequential damages under both of the heads mentioned should be included in the compensation awarded.

SHEIL J.: For the reasons stated by Black L.J. I would have been prepared to award compensation under the provisions of section 1 of the Malicious Injuries (Ireland) Act, 1853. For the rest, I agree with what my Lords have said.

Appeal dismissed.

Solicitor for the County Council: *A. F. Colhoun.*
Solicitor for the applicant: *Walter Murnaghan.*

J. P.

(1) [1920] 2 I.R. 143.

REGINA v. PAUL (1).

Motor car—Whether temporarily disabled vehicle within the term—Motor Vehicles and Road Traffic Act (Northern Ireland), 1934 (24 & 25 Geo. 5, c. 15), s. 2.

Motor car—Person in charge of motor car under the influence of drink—Circumstances constituting "in charge of" motor car—Motor Vehicles and Road Traffic Act (Northern Ireland), 1934 (24 & 25 Geo. 5, c. 15), s. 2.

The appellant was indicted for having been found in charge of a motor car under the influence of drink contrary to s. 2 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934. At the material time the car was incapable of being started owing to the condition of the battery. The appellant's case was that he was neither the owner nor the driver of the car and that when he was found sitting therein he was merely awaiting the return of the driver who had gone for assistance. It was admitted that the car was on a journey in connection with the appellant's business and that he had been alone in the car for about three quarters of an hour before the car was found by the police.

Held, (i) that a vehicle is a motor car within the meaning of the statute even though because of a mechanical breakdown it is impossible to propel it mechanically for the time being; (ii) that even if the case made by the appellant were accepted there was evidence upon which the jury could find that the appellant was in charge of the car.

APPEAL against conviction.

The appellant was arraigned before Lord MacDermott C.J. at Antrim Assizes on an indictment charging that he had been found when in charge of a motor car to be under the influence of drink or drugs contrary to s. 2 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934. The evidence adduced at the trial showed that the car belong to the appellant's son and on the day in question it had been used on a journey in connection with the appellant's business. The appellant was found by the police in the stationary car. He was seated in the driving seat and according to the police evidence he was asleep.

The appellant was taken to the police barracks and

(1) In the Court of Criminal Appeal before Porter and Black L.JJ. and Sheil J.; April 28, May 16, 1952.

examined by a doctor who deposed that he was under the influence of drink to such an extent as to be incapable of having proper control of a motor car. An examination by the police of the car showed that the ignition key was in the dashboard and the light switch was turned on, but the lights were not on, and efforts made by the police to start the car were unsuccessful on account of the battery being completely run down.

According to the evidence adduced by the appellant the car was on this occasion being driven by a friend named Blaney, and when the car broke down on the return journey Blaney went for the appellant's son in order to get him to tow the car in. The son was not at home and Blaney left a message from him and then returned to his own home. The appellant denied that he was asleep; he stated that after Blaney had gone for help he sat in the car for shelter and had moved into the driving seat from the front passenger seat only when the police approached.

The appellant was convicted and sentenced to six months imprisonment. He now appealed on the grounds that the car being immobilised and incapable of being propelled mechanically was not a motor car within the meaning of the statute, and that the trial judge ought to have directed the jury that there was no evidence upon which the jury could find that he was in charge of the vehicle.

McSparran Q.C. and *McGrath* for the appellant.
Hanna Q.C. and *Little* for the Crown.

Cur. adv. vult.

BLACK L.J. [delivering the judgment of the Court]:

In this case the appellant was convicted on indictment before the Lord Chief Justice at the County Antrim Spring Assizes of the statutory offence of having been found, when in charge of a motor car on a highway, to be under the influence of drink to such an extent as to be incapable of having proper control of the vehicle.

The facts of the case are shortly these. About 12-15

a.m. on the night of December 27-28, 1951, when a police car was on patrol on the Horseshoe Road, a short distance outside the boundaries of Belfast, a motor car was found stationary on the road without any lights. The appellant was sitting in the front of the car. According to the police witnesses he was sitting in the driver's seat and was sleeping. According to the appellant he was not asleep but awake, and had been sitting in the seat beside the driver's seat, but moved over to the driver's seat when the police came up to the car. The keys were in the dashboard of the car, the engine was switched off, but the light switch was on. The battery, however, was absolutely flat, and by reason of this condition of the battery the police were unable to start the engine. The police brought the appellant to Glengormley Barracks, where he was examined by a doctor. The doctor gave evidence at the trial as to the appellant's condition when he examined him, and in view of the verdict of the jury no question arises on this point.

The appellant appeals against his conviction on two grounds, first that by reason of the fact that it was immobilised and incapable of being mechanically propelled the vehicle was not a " motor car " within the meaning of the statute, and second that the Lord Chief Justice should, on the facts of the case, have directed the jury that there was no evidence on which they could find that the appellant was " in charge of " the vehicle.

As regards the first of these points we are clearly of opinion that the Lord Chief Justice was perfectly correct in directing the jury that the vehicle was a motor car within the meaning of the statute. In speaking of a motor car the statute means a certain type of vehicle, and a motor car is still a motor car within the meaning of the statute, a vehicle of the type to which the statute refers, even though because of some mechanical breakdown or some other reason it may be impossible to propel it mechanically for the time being. This, we think, is the view which has uniformly been taken by the English courts. In

Wallace v. Major (1), Humphreys J., referring to section 1 of the English Road Traffic Act, 1930, which directs that Part I of that Act shall apply to all mechanically propelled vehicles intended or adapted for use on roads, expressed the view that this provision applies equally to a motor vehicle which has temporarily broken down as it does to one which is, in fact, in working order and going along the road. In *Saycell v. Bool* (2), the respondent was charged with driving a motor vehicle while disqualified. The facts were that he had released the brakes of a lorry which he owned and which was standing at the head of an incline and steered it down the road into his garage, a distance of about 100 yards. The justices dismissed the charge, being of opinion that in the circumstances the van was not mechanically propelled and was not a motor vehicle within the meaning of the Act of 1930. The Divisional Court reversed this decision and remitted the case to the justices. It is perhaps worth noticing that in the present case the car was stopped on a downhill slope, and the police gave evidence that from the point where it was found it was possible to free-wheel a car right into the centre of Belfast, a distance of several miles, without using the engine at all. In *Jones v. English* (3), a lorry had broken down and had been towed into the position in which it was found parked in a side road. After the lorry had been left by the towing vehicle the driver partook of a few drinks and went to sleep in the lorry. The driver pleaded guilty to a charge of having been under the influence of drink while in charge of the vehicle. The only question before the Divisional court was whether there was evidence on which the justices were entitled to find special reasons for not imposing a disqualification on the driver. But no suggestion appears to have been made at any time that the lorry in its broken down condition was not a mechanically propelled vehicle.

On this branch of the case we would also refer to the recent Scottish decision in *Dean v. Wishart* (4), upon which Mr. McSparran placed strong reliance in support

(1) [1946] K.B. 473, 480.
(2) [1948] 2 All E.R. 83.
(3) [1951] 2 All E.R. 853.
(4) [1952] S.L.T. 86.

of the appellant's second ground of appeal. In that case the appellant had become incapably drunk, and his friends had put him, while apparently insensible, into the back seat of his car in a car park and had taken away the rotor arm from the distributor so as to immobilise the car. Although the High Court of Justiciary held that the appellant could not, under the circumstances, be fairly or properly described as being " in charge of " the car and spoke of the case as being a narrow and difficult one, yet none of the judges suggested that by reason of the removal of the rotor arm the car had ceased to be a motor vehicle within the meaning of the Act of 1930.

As regards the appellant's second ground of appeal, the facts so far as they are relevant, may be summarized as follows. The motor car in which the appellant was found by the police belonged to the appellant's son, who like the appellant himself is a motor dealer in Belfast. On December 27 the appellant used the car to go on a journey to Ballymena for the purpose, according to the appellant, of buying another car. According to the evidence of the appellant and his witness James Blaney, who also apparently deals in motor cars, the appellant took Blaney with him to Ballymena, and both on the outward and on the homeward journey the car was driven, not by the appellant, but by Blaney. Both the appellant and Blaney were vigorously cross-examined at the trial by counsel for the Crown, who suggested that this portion of the evidence for the defence was a tissue of lies, that Blaney was not in the car at all that evening, and that the car was driven by the appellant himself. If the jury, having seen the witnesses and having heard their evidence, took the view that Paul and Blaney were both obviously lying, and that Paul himself had undoubtedly been the driver of the car, they were in those circumstances of course entitled to find that Paul was in charge of the car when the police appeared on the scene. We do not know what view the jury took on this point. But even if they accepted the evidence that Blaney had driven the car from Belfast to Ballymena and back from Ballymena to where it

was found on the Horseshoe Road, we are clearly of opinion that they were still entitled to find that the appellant was in charge of the car when the police apprehended him. According to the appellant and Blaney they left Ballymena about 9-30 or 9-40 p.m. and travelled from Antrim along the Seven Mile Straight and into the Horseshoe Road. They say the car gave a considerable amount of trouble during the journey and finally came to a stop on the Horseshoe Road. It was then decided that Blaney should leave the appellant in the car and make his way down into Belfast to the appellant's son's premises in Agnes Street and there get help to tow the car in. This, according to the appellant's evidence, must have been about half past eleven, or after eleven o'clock. Blaney says that after walking some distance he got a lift into Belfast from a passing car and made his way to the appellant's son's house. The son was not at home. Blaney waited in the house for about thirty-five minutes and then went to his own home, leaving a message that if the son came in he should go round to Blaney's and that Blaney would go and give a hand to tow the car in. Blaney, however, did not go out again to the Horseshoe Road that night and there is no evidence as to whether the appellant's son did so. According to Blaney he first learned about the appellant being in trouble about the car when he read it in the newspaper.

The position then was that even accepting the evidence of the appellant and Blaney, Blaney had left the car a substantial time—apparently three quarters of an hour at any rate—before the arrival of the police, and that he never returned to look for it. So that it would be difficult to maintain that Blaney was in charge of the car when the police arrived. The appellant, however, was seated in one of the front seats of the car; he was actually in the driver's seat at the time when the police first spoke to him, though he says he only moved over to the driver's seat when he saw them coming over to the car. And although the car was not the property of the appellant but of his son, yet the appellant had either borrowed it or taken the use

of it for the journey. Nor were the circumstances such as in the recent Scottish case of *Dean v. Wishart* (1), in which a person, drunk and insensible, had been deposited in a motor car as a place of refuge. Blaney's evidence was that when he left the appellant he was standing outside the car smoking his pipe, and the appellant himself said that he was outside on the road, that when Blaney left he told him to watch the car, and that the appellant got into the car because it was getting cold. In our opinion it is quite impossible upon these facts to maintain that there was no evidence upon which the jury could find that the appellant was in charge of the car. Indeed it would seem difficult to see how, on the facts, they could justifiably have come to any other conclusion.

Upon this aspect of the case counsel pressed upon us two recent Scottish cases. In each of these cases, however, the facts differed substantially from the facts of the present case. In *Dean v. Wishart* (1), to the facts of which we have already referred, the High Court of Justiciary quashed a conviction by the sheriff-substitute, the Lord Justice General (Lord Cooper) stating that while it was a narrow and difficult case the accused was entitled to the benefit of any doubt. The other Scottish case which was relied upon was *Crichton v. Burrell* (2). In that case again the facts were very far different from those of the present case. Whether this court would have arrived at the same conclusion as the High Court of Justiciary on the facts of *Crichton v. Burrell* (2) we do not pause to consider. But Lord Cooper says that when section 15 of the Act of 1930 refers to a person "in charge of" a car the reference must be to the person in de facto control, even though he may not be at the time actually driving or attempting to drive (3). In our opinion there was ample evidence in the present case to justify the conclusion that the appellant was in de facto control of the car when the police arrived.

The facts of the present case more closely resemble

(1) [1952] S.L.T. 86.
(2) [1951] S.C. (J.) 107.
(3) Ibid. 111.

those in the English case of *Jowett-Shooter v. Franklin* (1). Though the only point actually before the Divisional court in that case was as to whether there were special reasons justifying the recorder's decision that the motorist should not be disqualified, yet it is, we think, significant that no one appears to have suggested that he was not "in charge of" the car.

During the argument counsel for the appellant challenged a sentence in the direction to the jury as to whether the appellant could be held to be in charge of the car. The Lord Chief Justice said: "If a man is "found in or about the car, and in a position to drive "off, if he chooses to, without the consent or authority "of anybody else, then you are entitled to say that "man is in charge of the car. He does not need to be "sitting at the wheel." It is objected that this test, if applied to the facts of *Crichton v. Burrell* (2) would have led to a different decision from that arrived at by the High Court of Justiciary. Without seeking at all to canvass the decision in that case a complete answer to the appellant's contention clearly is that the Lord Chief Justice was not professing to expound the precise meaning of the words "in charge of" in a definition which could be applied in every case. Indeed in the sentence in his charge immediately preceding the one which is challenged, he expressly disclaimed that he was attempting to do so. He was only addressing himself to the facts of the particular case with which he was dealing. Without finding it necessary to consider whether the sentence which is challenged could be applied as a test in all circumstances in which a person is alleged to have been in charge of a car, we are satisfied that on the admitted facts of the present case the sentence used by the Lord Chief Justice, directed as it was to the actual facts of that case, amounted in no way to a misdirection of the jury.

The appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellant: *D. P. Marrinan.*

Solicitor for the Crown: *Crown Solicitor for the County of Antrim.*

J. P.

(1) [1949] 2 All. E.R. 730. (2) [1951] S.C. (J.) 107.

REGINA (McIVOR AND OTHERS) v. JUSTICES OF THE COUNTY OF FERMANAGH (1).

Summary jurisdiction—Resident magistrates in petty sessions—Power to bind over offenders—Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935 (25 & 26 Geo. 5, c. 13), ss. 2, 3, 41.

A court of summary jurisdiction consisting of a resident magistrate or resident magistrates sitting in petty sessions has no power to bind over an offender to keep the peace or to be of good behaviour for a period in excess of the twelve months provided by s. 41 of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, notwithstanding that s. 3 of the same Act confers on resident magistrates the powers of justices of the peace as existing immediately before the passing of that Act, which powers included a power to bind over for periods in excess of twelve months.

MOTIONS to make absolute conditional orders of certiorari.

The facts of the case sufficiently appear in the judgment of the court.

Stewart Q.C. and *McSparran* for the prosecutors.

McVeigh Q.C. and *Shaw* for the Crown.

Cur. adv. vult.

PORTER L.J.: The judgment of the court will be delivered by Sheil J.

SHEIL J.: Of the seven prosecutors in these cases, four were summoned for alleged offences against section 3 (1) of the Public Order Act (Northern Ireland), 1951, two for alleged offences against section 59 of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, and one for an alleged offence against section 38 of the Offences against the Person Act, 1861.

The charges varied in nature and, indeed, in gravity, but a factor common to all of them was that all the summonses, which were headed "Summary Juris-

(1) In the Queen's Bench Division (Crown Side) before Porter L.J. and Sheil J.: May 12, 1952.

" diction Acts, Northern Ireland," were returnable at the Petty Sessions Courthouse at Enniskillen on December 3, 1951, before such resident magistrate as should be there, and it was agreed, before this court, that the date specified was one of the days appointed for the holding of petty sessions in Enniskillen.

At an adjourned hearing of that court each of the prosecutors was convicted of the offence alleged against him. They make common complaint in this court, not of the conviction as such, nor of the pecuniary penalties imposed, but that the learned resident magistrate acted in excess of and without jurisdiction in ordering each of them to enter into recognisances to keep the peace and be of good behaviour for the period of two years.

If section 41 of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, applies to these proceedings the complaint is well founded ; if not, much is to be said for the wide jurisdiction contended for by the Crown. It seems to us beyond doubt that section 41 does apply and, that being so, it is unnecessary to consider the impressive decisions and dicta cited by Mr. McVeigh.

These persons were summoned before a court of summary jurisdiction. Since 1935 a court of summary jurisdiction in Northern Ireland consists of a resident magistrate or resident magistrates sitting in petty sessions : Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, s. 2 (1). Section 41 of that Act specifically enacts the power of a court of summary jurisdiction to bind over. It is as follows :— " A court of summary jurisdiction . . . by whom any " person is convicted of any offence may, in addition " to imposing any other penalty, order the offender to " enter into a recognisance, with or without sureties, " to keep the peace or to be of good behaviour, or to " keep the peace and be of good behaviour for a period " not exceeding twelve months." Here there was a court of summary jurisdiction, a person (in each case) convicted, in each case a penalty, and in each case an order to enter into recognisances to keep the peace and

be of good behaviour for a period of two years. Whatever may be said for inherent jurisdiction or for the residuum of jurisdiction remaining in a justice of the peace under section 3 (2) (*a*) of the Act, the words of section 41 are so clear that if these orders were to stand this court would be flouting the Act of Parliament.

It has not been sought to show that the orders are divisible into good parts and bad parts, and in our opinion the conditional orders should be made absolute notwithstanding the cause shown. Mr. McVeigh has, very properly, declined to argue that the fact that Quinn and Henderson have complied with the requirements of the orders precludes them from challenging the validity of the orders made in their cases.

Orders absolute.

Solicitors for the prosecutors: *Maguire & Herbert* and *J. G. Lennon.*

Solicitor for the Crown: *Chief Crown Solicitor.*

J. P.

SHELL-MEX & B.P. LTD. v. BELFAST CORPORATION (1).

Nuisance—Rule in Rylands v. Fletcher *—Gas main under private road—Fracture resulting from operations of third party causing explosion—Failure of gas undertakers to guard against damage to main—Negligence.*

An explosion which damaged the plaintiffs' premises resulted from gas escaping from a fracture in a gas main which the defendant Corporation had laid under the surface of a private road. The fracture was due to the fact that subsequent to the laying of the main the owners of the road had excavated and placed a sewer running under the main, and after this excavation was filled in a certain amount of subsidence had taken place. It was proved that the defendant Corporation had no system for collecting informaion about excavations in the neighbourhood of its mains under private roads, but was content to rely on complaints to learn whether there was anything wrong.

Held, that there was evidence on which a jury could find that the defendant Corporation was negligent in the maintenance of the main.

Northwestern Utilities Ltd. v. London Guarantee and Accident Co. [1936], A.C. 108 applied.

APPEAL against judgment entered for the plaintiffs by Lord MacDermott C.J. at the trial of an action with a special jury of the City of Belfast.

The plaintiffs, Shell-Mex & B.P. Ltd., were lessees and occupiers of buildings and premises at Airport Road, Sydenham, Belfast, under two leases from the Belfast Harbour Commissioners. On the premises facing Airport Road was a one-storey brick building containing offices and lavatory accommodation.

In 1944 the Belfast Corporation, by virtue of their statutory powers as gas authority and gas undertakers for the City of Belfast, had laid a high pressure gas main in Airport Road. This main was constructed of cast iron pipes six inches in diameter and laid under the footpath at a depth of three feet, but at a point twenty feet from the plaintiffs' premises the main was carried under the road to the other side where it continued under the footpath. Subsequently the Belfast

(1) In the Court of Appeal before Porter and Black L.JJ. and Curran J.; April 30, May 1, 2, 5, July 31, 1952.

Harbour Commissioners excavated in Airport Road for the purpose of laying a sewer, and this sewer passed underneath the gas main at the point where the latter crossed the road. Subsequent to the laying of the sewer some subsidence in the soil occurred which left the gas main partially unsupported.

On April 10, 1949, a smell of gas was noticed in the plaintiffs' premises, and on the next day, as the smell was stronger, one of the plaintiffs' officials telephoned the Gas Department of the Corporation. Employees of the Gas Department came to the site and began to dig in order to discover the cause of the escape, and while they were so engaged there was a violent explosion in the plaintiffs' building which caused damage to the premises and furniture and inflicted injuries on members of the plaintiffs' staff. The immediate cause of the explosion was the subject of conflicting evidence: the plaintiffs suggested that the Gas Department's workmen when digging had used ferrous tools which caused sparks by striking against the pipes or stones and so ignited the gas; the defendant Corporation attributed the ignition of the gas to a fire burning in a stove in the office on the plaintiffs' premises.

Excavations made after the explosion revealed a fracture in the gas main at the point where the main crossed the road, and this fracture appeared to be the result of the partially unsupported main being unable to stand the pressure and vibration of traffic on the roadway.

Witnesses for the Corporation stated that the Corporation was not notified that the sewer was to be laid under the gas main and that there was therefore no opportunity to see that the excavation was properly refilled. They further stated that though other departments of the Corporation always informed the Gas Department of any works to be done on roads vested in the Corporation which might affect the gas mains, there was no similar arrangement with regard to roads vested in the Harbour Commissioners, but that the Gas Department would have sent a representative to

supervise the laying of the sewer if they had known of it. Apart from notice of excavations the Gas Department relied on complaints for the discovery of faults. It was admitted that there had been fractures in other sections of the main in Airport Road in 1946 and 1947.

The jury found that the explosion was not caused by the use of ferrous tools by the Corporation's workmen. In answer to another question they found that the plaintiffs could have avoided the explosion by the use of reasonable care, but it was not clear if by this latter finding they meant that an earlier warning should have been given to the Gas Department, or that the fire in the stove in the plaintiffs' premises should have been extinguished. However, this finding was not impugned by the plaintiffs and the real controversy between the plaintiffs and the defendant Corporation was whether there was sufficient evidence to justify the answer of the jury to question 6 : " Were the defendants negligent " in their maintenance of the said main in not taking " steps to prevent the said fracture ?—Yes."

On these findings the Lord Chief Justice entered judgment for the plaintiffs. The defendant Corporation appealed against this judgment on the ground, inter alia, that there was no evidence to support the finding of negligence against it.

Patton Q.C., *Hanna Q.C.* and *Reid* for the appellant Corporation.

Jones Q.C., *Agnew Q.C.* and *Phelan* for the respondents.

Cur. adv. vult.

PORTER L.J. [after stating the facts continued] :

It can hardly be denied that where premises are damaged by an explosion of gas which has escaped from a gas main laid in the adjoining highway, there is a nuisance. The gas main in the Airport Road was constructed by the Corporation under and in pursuance of powers conferred upon them by various statutes, including the Gasworks Clauses Act, 1847, and the Gasworks Clauses Act, 1871. By section 9 of

the latter Act, which virtually re-enacts section 29 of the earlier Act, it is provided as follows: "Nothing "in this or the special Act shall exonerate the Under- "takers from any indictment action or other pro- "ceeding for nuisance in the event of any nuisance "being caused by them." Undertakers under the Electricity Supply Acts are subject to a similar provision, which is contained in section 81 of the Schedule to the Electric Lighting (Clauses) Act, 1899. Our law regards gas and electricity as dangerous things which cannot be manufactured, transmitted or used without very considerable risk of injury and damage, and therefore undertakers who cause a nuisances in the exercise of their statutory powers, privileges, and duties, are subject to the same common law liability as an ordinary citizen. The finding of the jury that the explosion in the office building was caused by the escape of gas from the fracture in the gas main appears to bring the case within the scope of the principle laid down in *Rylands v. Fletcher* (1).

In *Carstairs v. Taylor* (2), Martin B. said that *Rylands v. Fletcher* (1) referred only to the acts of adjoining owners of land, but later decisions have shewn that the principle is not so restricted, and that it applies also to a case like the present where the gas main was laid down by the Corporation in the Airport Road (which is part of the Harbour Commissioners' estate) with the permission of the Commissioners: *Charing Cross Electricity Supply Co. v. Hydraulic Power Co* (3). In that case water had escaped on four different occasions from fractures in the mains of the Hydraulic Power Company and caused considerable damage to the underground electric cables of the Electricity Supply Company. The effective cause of the fractures was the subsidence of the soil leaving the pipes unsupported, and also the vibration caused by the heavy traffic in a hard frost. The Hydraulic Power Company

(1) (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330.
(2) (1871) L.R. 6 Ex. 217, 223.
(3) [1914] 3 K.B. 772.

was not guilty of any negligence and could not by any reasonable care have detected the subsidences before the fractures occurred. The Court of Appeal (Lord Sumner, Kennedy L.J. and Bray J.) held the case to be indistinguishable from *Rylands v. Fletcher* (1).

So also in *Midwood v. Manchester Corporation* (2) which was not the case of a dispute between the owners of two adjacent closes—there was a fusion of one of the electric cables of the Corporation in a street owing to a failure in the insulation of the conductors which caused a short circuit, and the heat so generated volatilized the bitumen in which the main was laid, giving off an inflammable gas, which accumulated and found its way into a house adjoining the plaintiff's property, where it exploded and caused a fire which damaged the plaintiff's property. It was alleged in the claim that the damage was due to a nuisance caused by the defendants or in the alternative that the defendants were guilty of negligence. The Court of Appeal (Collins M.R., Romer and Mathew L.JJ.) held that apart from any question of negligence the defendants were liable to the plaintiffs as for a nuisance.

This doctrine of strict liability, as it has been called, is subject to several exceptions, one of which relating to the act of a stranger, was mooted by Bramwell B. in *Nichols v. Marsland* (3), laid down in *Box v. Jubb* (4), and applied by Lord Moulton in *Rickards v. Lothian* (5) It was this exception that was the main bulwark of the defence on which the Corporation relied. Paragraph of the defence 10 is as follows : " If any such nuisance " as is alleged in Paragraph 4 of the Statement of " Claim arose upon the Plaintiff's premises the same " was not created by the Defendants but was caused " by the unlawful and negligent acts of persons over " whom the Defendants had no control, and against " the commission of which acts the Defendants could " not have taken any effective precautions."

(1) (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330.
(2) [1905] 2 K.B. 597.
(3) (1875) L.R. 10 Ex. 255, 259.
(4) (1879) 4 Ex. D. 76.
(5) [1913] A.C. 263, 267.

Mr. Patton argued that the damage was caused not by any act or default of the Corporation but by the acts of the Harbour Commissioners in excavating the soil under the gas main when laying their sewer, and wrongfully causing a subsidence of the soil supporting the gas main, with the result that the pipe, being unable to sustain the weight of the ground above it and the heavy traffic on the road with the consequent vibration, was fractured, and the high pressure gas escaping into the surrounding soil made its way into the company's premises where it caused a violent explosion. The Corporation, he said, had no knowledge of the laying of the sewer, nor was it reasonable to assume that they could have foreseen the laying of it, and should have taken precautions to ensure that there would be no disturbance or subsidence of the soil under the gas main, nor could they have anticipated the fracture of the pipe, the escape of the gas into the office building or the resulting explosion.

No question was put to the jury on this issue, and if this defence had been presented at the trial with anything like the prominence it assumed in this court, I cannot understand why such a question was not included by Mr. Patton in the written draft of the questions which he submitted should be left to the jury. It may have been thought that this issue was adequately dealt with by question 3, which asked whether the subsidence of the supporting soil occasioned by the making of the sewer by the Harbour Commissioners was a cause of the fracture. The use of the words " a " cause " instead of " the cause " appears to suggest that there might have been other causes, for example, the weakness of the pipe, the heavy traffic on the road, or some act or default on the part of the Corporation or some other person or persons, but while the affirmative answer of the jury places a certain amount of blame upon the Commissioners, it in no wise absolves the Corporation from a share of the responsibility for the damage. There is no finding that the *nuisance* was caused by the wrongful and negligent acts of the

Harbour Commissioners or that the Corporation could not have taken any effective precautions against such acts. In fact, when the jury gave an affirmative answer to question 6—"Were the defendants negligent "in their maintenance of the said main in not taking "steps to prevent the said fracture?"—that answer was sufficient to dispose of the defence based upon *Box v. Jubb* (1) and *Rickards v. Lothian* (2).

Mr. Patton argued that the Corporation had no opportunity to take any precautions and therefore could not be guilty of negligence in not taking any precautions, that they did not know of the time or the place at which the sewer was being laid and could not have prevented the subsidence which caused the fracture. Mr. Hyslop, the Manager of the Gas Department, referring to this matter said: "I did not know "of this" (the laying of the sewer) "and I don't think "anyone else knew of this sewer before the explosion. "If I had known I don't think it would have made any "difference to this accident. We always expect a "little subsidence after soil has been disturbed. "Seven-eighths inch subsidence here. Could not ex- "pect less subsidence. I would think the Harbour "Commissioners did their work efficiently. I don't "think Corporation would have filled sewer trench any "better. . . If we had known of the Harbour "Commissioners' sewer at the time we would have "taken steps to superintend the filling in to see that "soil was well compacted. If we had not known of "sewer till afterwards I don't think there is any- "thing we could have done." Mr. Campbell, the Distribution Superintendent of the Gas Department, also said: "We depend on complaints to know if "anything is wrong. This main is no more necessary "to look after than any other main going past in- "habited premises. I suppose if they" (meaning the Corporation officials) "had looked they would "have seen something of the sewer work. If I had "seen the sewer being laid I would certainly have "taken notice. I would have made sure that ground

(1) (1879) 4 Ex. D. 76. (2) [1913] A.C. 263.

" was well rammed and consolidated under the main. " They would do the work. Would not let us do it, " but we would have a right to be there. The earlier " trouble was with a different section of this main. " 1946 or 1947. Sewer was laid at time we were " relaying this Northern part of the main. When " public streets in Belfast are opened we get official " notice to let us send inspector to arrange for safety " of gas mains in vicinity. We have no system of " inspection to ascertain if streets not public are being " opened. May hear casually and then we would " send an inspector. But no system for getting to " know of excavation work in neighbourhood of mains " under private roads."

The duty of gas undertakers and companies to prevent an escape of gas has been discussed in several cases. In *Mose and Wife v. Hastings and St. Leonards Gas Co.* (1)—a case decided before *Fletcher v. Rylands* (2)—the plaintiffs who had no gas laid on in their house detected a strong smell of gas on three successive days. At noon on the third day they sent word to the gasworks. Workmen arrived in the afternoon and discovered that there was an escape of gas from the main into the house, but before repairs could be executed an explosion occurred in the plaintiff's and two adjoining houses. When the pathway was taken up it was found that the gas had escaped from a hole at the junction pipe. The company denied negligence and want of skill in keeping and conveying the gas. There was a verdict for the plaintiffs, who were awarded £160 damages. When summing-up, Pollock C.B., said that it was the duty of all gas companies to use due and reasonable care to prevent mischief from the escape and explosion of gas, that there was evidence from which the jury might come to the conclusion that there had not been such due and reasonable care, and that without saying that the company ought every day to send men over the entire district to ascertain whether there was any escape

(1) (1864) 4 F. & F. 324. (2) (1865) L.R. 1 Ex. 265.

from the mains, at all events it was for the jury to say whether the not sending anyone for several days during which, according to the evidence, the escape of gas and the danger of an explosion was discoverable, was such reasonable care as the company was bound to exercise. It was clear there ought to be some system of supervision and that men should always be in readiness to repair any leakage that might be discovered, and that anything short of those precautions against accidents amounted to neglect for which they were liable.

In *Price v. South Metropolitan Gas Co.* (1), the fracture of the gas main was due to the same causes as in the present case. Owing to excavations made by the Commissioners of Sewers within 2½ feet of a gas main laid in the highway at a depth of 10½ inches one of the pipes was deprived of support. The weight of the traffic on the road caused a fracture in the pipe and an escape of gas occurred and accumulated for two or three days, resulting in an explosion which injured a man who was passing at the time. The company was unaware of the escape, as also of the excavation of which they had no notice, but they employed men to go all over the district and report an escape as soon as it could be detected, and these received rewards for so reporting. There was no evidence of a smell of escaping gas, but it was found that there were two cracks in the pipe, one a longitudinal crack which did not cause any material escape, but the other a transverse fracture which allowed a considerable quantity to escape. The court (Russell L.C.J. and Grantham J.) held that there was evidence of negligence, that the escape ought to have come to the knowledge of the Company, that the fracture ought to have been repaired and that the company ought to have known that the ground had been excavated and that the soil underneath the pipe had not been carefully replaced. Lord Russell was most emphatic about the precautions which ought to be taken in the inspection and maintenance of gas pipes under the highway.

(1) (1895) 65 L. J. Q.B. 126.

Again in *Hanson v. Wearmouth Coal Co. and Sunderland Gas Co.* (1), the plaintiff's house was damaged by explosion of gas which had escaped from the fracture of a gas main in the street. The fracture was caused by the subsidence of the soil underneath the pipe and the subsidence was caused by the working of a seam of coal 1,600 feet beneath the surface by the Coal Company who had a lease from the Ecclesiastical Commissioners permitting them to let down the surface subject to payment of compensation. The evidence shewed that the Gas Company took no steps to prevent the escape of gas in the event of a subsidence. Goddard L.J. (as he then was) said that the Gas Company wholly failed to prove that they were not guilty of negligence for they produced no evidence that they did or tried to do anything or even considered whether or not there was anything they could do such as the use of mild steel pipes or flexible joints. They had laid their pipe in a place from which they knew support might be withdrawn, thus deliberately taking the risk of a fracture by the subsidence of the soil.

In the present case we find the same irresponsible attitude of mind, the same thoughtlessness, the same want of reasonable care and foresight on the part of the officials, and the same absence of precautions. Yet this was not the first occasion on which there had been an escape in a section of this main, as appears from a letter dated September 30, 1946, from Mr. Hyslop to Major Patton, the Engineer of the Harbour Commissioners, relating to the re-surfacing of the Airport Road and the use of a heavy roller. Mr. Hylsop writes that he was aware that the lead jointed pipes he was obliged to use at the time failed to stand up to the conditions of the road and that the trouble would be aggravated by the use of a heavy roller, and also that if the main was overlaid with a strip of concrete he could not ensure that there would be no recurrence of escapes. One would think that the

(1) [1939] 3 All E.R. 47.

knowledge of these earlier troubles for apparently there were several should have served as a warning to the Corporation to take stringent precautions to prevent any further escape from the main. But they did nothing. Once the main was laid across the road it was left to look after itself, and their responsible officers never directed their minds to the serious consequences which were likely to ensue if a main sewer or water main was laid under it, thus causing a subsidence (which the evidence shewed to be inevitable) and depriving the main of necessary support.

The statement of Mr. Campbell that the Corporation had no system of inspection to ascertain if streets not public were being opened, and that they depended on complaints to know if there was anything wrong, shews a complete misapprehension of their duty to take every possible precaution to prevent injury to persons or damage to property by an escape of gas from this main. Nor can any reason be given why the Corporation should not have asked the Harbour Commissioners for information of any intended excavation or work which might disturb the soil surrounding or supporting the gas main in order that their officials might be present to ensure that the main was securely protected and left in a safe condition. If some subsidence was inevitable, I cannot believe that it would have been impracticable to adopt some method of underpinning or supporting the main which might have prevented or at all events lessened the possibility of a fracture.

The strict liability imposed by the law upon gas authorities was discussed in *Northwestern Utilities Ltd. v. London Guarantee & Accident Co. Ltd.* (1), a case before the Privy Council, in which Lord Wright, delivering the opinion of the court, made some interesting observations on the subject. The Corona Hotel in Edmonton, belonging to and insured by the Guarantee Company, was destroyed by fire caused by the escape and ignition of gas which had percolated

(1) 1936 A.C. 108.

through the soil and penetrated into the hotel basement from a fractured joint in the main of the Utilities Company under the public street. The cause of the fracture (as in the present case) was the excavation of the soil and the construction of a sewer under the main by the City of Edmonton. It was held that as the Utilities Company was carrying gas at high pressure which was very dangerous if it should escape, they owed a duty to the hotel owners to exercise reasonable care and skill to prevent damage by the escape of gas. The degree of care which that duty involved should be proportioned to the degree of risk involved, and it was the duty of the Utilities Company to watch such operations as the City might conduct in connection with sewers in the vicinity of the gas main, and that although under the rule in *Rylands v. Fletcher* (1), the Utilities Company would not be liable for damage caused without default on their part by the independent act of a third party, they were negligent in failing to foresee and guard against the consequences to their main by the operations of the City in excavating and constructing the sewer under the main.

" In truth," said Lord Wright (2), " the gravamen " of the charge against the appellants in the matter " is that though they had the tremendous responsi- " bility of carrying this highly inflammable gas under " the streets of a city, they did nothing at all in all the " facts of the case. If they did not know of the City " works their system of inspection must have been " very deficient. If they did know they should " have been on their guard : they might have ascer- " tained what work was being done and carefully " investigated the position, or they might have " examined the pipes likely to be affected so as to " satisfy themselves that the bed on which they lay " was not being disturbed. Their duty to the res- " pondents was at the lowest to be on the watch and " to be vigilant : they do not even pretend to have

(1) (1868) L.R. 3 H.L. 330 (2) 1936 A.C. 108, 127.

" done as much as that. In fact, so far as appears, " they gave no thought to the matter. They left " it all to chance. It is, in their Lordships' judgment, " impossible now for them to protest that they could " have done nothing effective to prevent the accident : " and in any case their Lordships cannot accept that " as the true view."

The main in that case, it is true, was laid in the public street, but is it the duty of the Corporation to prevent damage from an escape of gas whether the main be in a private or a public street, and since according to the evidence the risk of a fracture in the main is greatest where the pipeline is laid under and across the road, that was the part which called for special care and vigilance.

Not only did the Corporation do nothing, but they did not attempt to do anything. There is clear evidence of negligence, and the appeal must be dismissed.

BLACK L.J. : The question to be decided on this appeal is whether on the evidence adduced at the trial the jury were entitled to give an affirmative answer to question 6 submitted to them by the Lord Chief Justice namely : " Were the defendants negligent in " their maintenance of the main in not taking steps " to prevent the said fracture ? "

I need not recapitulate the facts of the case as this has already been done by Porter L.J. in his judgment. And in regard to the law applicable to those facts I think there is little necessity to go beyond the judgment of the Privy Council in *Northwestern Utilities Ltd. v. London Guarantee and Accident Co* (1). In that case the appellants, like the appellants in the present case, were carrying gas at pressure in one of their mains. In that case, as in the present case, an escape of gas took place by reason of a fracture of the main with the result that serious damage was caused to the respondents' property. In the *Northwestern Utilities* case (1) the cause of the fracture of the main

(1) [1936] A.C. 108.

was found to be the operations of the local authority, the City of Edmonton, in constructing a sewer involving underground work immediately beneath the appellants' main, without providing adequate support for the main, the consequence being that the main sagged and one of the joints between the pipes opened. In the present case the fracture of the main was due to the operations of the Harbour Commissioners in laying a sewer along one of their roads. This sewer passed under the appellants' main where the main crossed the road. The road was apparently one which carried traffic of a heavy nature. After the excavation for the sewer was filled in by the Harbour Commissioners a certain amount of subsidence took place. This weakened the support of the appellants' main and presumably as a result of the heavy traffic a crack developed in one of the pipes through which an escape of gas took place which caused the damage to the respondents' property. In the *Northwestern Utilities* case (1) the operations of the local authority, as both the Canadian courts and the Privy Council held, were such that a failure to know of them was plainly not consistent with due care on their part in the interests of members of the public likely to be affected.

In the *Northwestern Utilities* case (1) Lord Wright delivering the opinion of the Privy Council first deals with the general rule usually referred to as the rule in *Rylands v. Fletcher* (2). He says: "That gas is a "dangerous thing within the rules applicable to "things dangerous in themselves is beyond question. "Thus the appellants who are carrying in their mains "the inflammable and explosive gas are prima facie "within the principle of *Rylands v. Fletcher* (2), affirming *Fletcher v. Rylands* (3), that is to say that though "they are doing nothing wrongful in carrying the "dangerous thing so long as they keep it in their "pipes, they come prima facie within the rule of strict "liability if the gas escapes: the gas constitutes an

(1) [1936] A.C. 108, 118.
(2) (1868) L.R. 3 H.L. 330.
(3) (1866) L.R. 1 Ex. 265.

"extraordinary danger created by the appellants "for their own purposes, and the rule established by "*Rylands v. Fletcher* (1) requires that they act at their "peril and must pay for damage caused by the gas "if it escapes, even without any negligence on their "part. The rule is not limited to cases where the "defendant has been carrying or accumulating the "dangerous thing on his land: it applies equally in "a case like the present where the appellants were "carrying the gas in mains laid in the property of the "City (that is in the subsoil) in exercise of a franchise "to do so: *Charing Cross Electricity Supply Co. v. "Hydraulic Power Co.* (2)."

Lord Wright then refers to two classes of case where the rule of strict liability laid down in *Rylands v. Fletcher* (1) has been modified, one where what was done by the defendants was properly done in pursuance of statutory powers and the mischief was not brought about by any negligence on the part of the defendants, and the other where the mischief was caused by a deliberate or conscious act of a third party and not through any negligence of the defendants. At p. 120 Lord Wright points out that in *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.* (2) it was held, following the previous decision in *Midwood & Co. Ltd. v. Manchester Corporation* (3), that the defence of statutory authority was excluded by a section in the Act of Parliament under which the undertakers were operating that nothing in the Act should exonerate them from liability for nuisance. In the present case the defendants are subject to the provisions of s. 9 of the Gasworks Clauses Act, 1871, a section almost identical in its wording with the section on which the *Charing Cross* case (2) turned. Accordingly it seems clear that the defendants cannot claim exemption on the ground of statutory authority from the strict liability imposed by the rule in *Rylands v. Fletcher*(1).

If then the defendants are to escape liability in the present case it must be upon the ground that the cause

(1) (1868) L.R. 3 H.L. 330. (3) [1905] 2 K.B. 597.
(2) [1914] 3 K.B. 772.

of the mischief was the deliberate or conscious act of a third party. No doubt it may be said from the facts which emerged at the trial that it would appear that the real cause of the disaster was to be found in the operations of the Harbour Commissioners in laying their sewer in Airport Road without securing that adequate support should be left for the defendants' gas main. This may well be. But the Harbour Commissioners are not parties to the present proceedings. The contest is between the plaintiffs and the Belfast Corporation and the one question is whether or not the Corporation is exempt from liability. On this aspect of the case Lord Wright in the *Northwestern Utilities* case (1) sums up the legal position by saying : " The authorities already cited herein show " that, though the act of a third party may be relied " on by way of defence in cases of this type, the defend- " ant may still be held liable in negligence if he failed " in foreseeing and guarding against the consequences " to his works of that third party's act." The question then in the present case will be : " Was there " evidence upon which the jury were justified in " holding that the Corporation were negligent in " failing to take precautions which might have obviated " the mischief which resulted as a consequence of the " Harbour Commissioners' operations ? " The facts relied upon as establishing negligence on the part of the defendants in the present case are certainly not nearly so strong as those in the *Northwestern Utilities* case (1). In that case, the operations of the local authority which undermined the defendants' main were, from their public nature and conspicuous character and from the time during which they went on, such that a failure by the defendants to know of them was clear evidence of negligence on their part. In the present case the sewer was laid not in a highway vested in the Corporation but in a roadway on the Harbour Commissioners' estate to which it may possibly be doubtful whether the Corporation's officials had access as of right. Nor is there any clear evidence

(1) 1936 A.C. 108, 125.

to fix the Corporation's officials with knowledge of the laying of the sewer. Undoubtedly, however, interference with the soil in the vicinity of a gas main may weaken the support of the main and possibly lead to a fracture of the pipes, and this is especially the case where the main is laid in a roadway over which heavy traffic passes. A typical instance of such a mishap is to be found in the case of *Price v. South Metropolitan Gas Co.* (1), referred to by Porter L.J. That there is always a possibility of earth subsidence and danger to a gas main when a sewer is laid was conceded by Mr. Campbell, the distribution superintendent of the Corporation's Gas Department. It also appeared from Mr Campbell's evidence that when public streets in Belfast are opened the Gas Department get official notice to let them send an inspector to arrange for the safety of gas mains in the vicinity. This would appear to be a very proper inter-departmental arrangement between the various Corporation departments. Mr. Hyslop, the Corporation Gas Manager, said that they had an arrangement with the City Surveyor to notify them of street works. There is no system, however, of the Corporation getting to know of excavation work in the neighbourhood of their gas mains under private roads such as those in the Harbour Commissioners' estate. I think it was open to the jury to take the view, if they thought proper, that the Corporation ought to have had some system whereby they would be notified of any excavations in the vicinity of their gas mains on private property, especially where those mains (and high pressure mains at that) were laid in a roadway over which heavy traffic passed. The jury might for example have considered that when laying mains on roadways in the Harbour Estate the Corporation ought to have some arrangement with the Harbour Commissioners to notify the Gas Department of any excavation work which the Commissioners might at any time embark upon in the vicinity of the mains so that the Gas Department could take any steps which

(1) (1895) 65 L.J., Q.B. 126.

were necessary to protect the mains and ensure their adequate support. Mr. Campbell in his evidence said that if he had seen the sewer being laid close to the main he would certainly have taken notice and in answer to the Lord Chief Justice Mr. Hyslop said that if they had known of the Harbour Commissioners' sewer at the time they would have taken steps to superintend the filling in. On this evidence I think it was open to the jury to come to the conclusion that the Corporation ought to have had some system of receiving notification of work in the vicinity of their gas mains and that by not having such a system they fell short of taking the precautions which they ought to take in such matters. I do not for a moment suggest that the jury were bound to come to this conclusion. The question was eminently one for the jury and they might quite conceivably have taken a different view. But there was in my opinion evidence before them on which they could, if they thought proper, return an affirmative answer to question 6. I do not lose sight of the fact that in his evidence Mr. Hyslop expressed the opinion that if the Corporation had known of the laying of the sewer he did not think that there was anything they could have done. But I respectfully agree with the Lord Chief Justice that the jury were free to take the view that if the Corporation had known in time they could and should have taken some step to ensure the safety of the gas main rather than that it should be left in a condition in which, as events proved, it ran a risk of being fractured with the possibility of serious consequences to persons and property in the vicinity. And indeed the jury may have thought that if the Corporation had known of the excavation they would have recognised that this particular part of the main would have required and should and would have received a special degree of attention inasmuch as the fracture occurred in the small section of the main where the main crossed the road and which might therefore be a specially vulnerable section of the main.

Accordingly I agree that the appeal should be dismissed.

CURRAN J.: I concur.

Appeal dismissed.

Solicitor for the appellant Corporation: *Henry J. Catchpole.*

Solicitor for the respondents: *L'Estrange & Brett.*

J.P.

R. (BOWDEN) v. JUSTICES OF THE CITY OF BELFAST (1).

Motor car- Convictions for driving recklessly, at a speed dangerous to the public, and in a manner dangerous to the public—Convictions arising out of the same event- Validity--Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926 (16 & 17 *Geo. 5, c. 31), s. 1 (1)- Motor Vehicles and Road Traffic Act (Northern Ireland)*, 1934 (24 & 25 *Geo. 5, c. 15), s. 1 (1).*

Though section 1 (1) of the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926, as amended by s. 1 (1) of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934, creates three distinct offences, viz., driving recklessly, driving at a speed which is dangerous to the public, and driving in a manner which is dangerous to the public, a defendant cannot be convicted of more than one of these offences arising out of the same event or occurrence. So *held* by the Queen's Bench Division (Lord MacDermott C.J., Black, L.J. and Sheil J.-

Held, further by Lord MacDermott C.J. and Sheil J., Black L.J. dissenting on this point, that where a defendant has been convicted on more than one charge based on this section arising out of the same event or occurrence and there is nothing to guide the court in choosing between the convictions all must be quashed.

MOTION to make absolute a conditional order of certiorari.

The prosecutor in this case was convicted as a defendant at Belfast Petty Sessions on a summons charging him with driving recklessly, driving at a speed which was dangerous to the public, and driving in a manner which was dangerous to the public on March 21, 1952. At the hearing it was clear that the three complaints arose out of the same occurrence. The resident magistrate convicted on each charge and imposed a fine of £10 on each charge and in addition suspended the prosecutor's driving licence and disqualified him from obtaining another for eighteen months.

(1) In the Queen's Bench Division (Crown Side) before Lord MacDermott C.J., Black L.J. and Sheil J.; July 28, 29, Oct. 24, 1952.

The prosecutor obtained a conditional order of certiorari to quash the conviction on the grounds:

(1) that the resident magistrate purported to convict the prosecutor of three offences, whereas only one is defined by section 1 of the Motor Vehicles (Traffic and Regulation) Act, (Northern Ireland), 1926, as amended;

(2) that the resident magistrate purported to impose a penalty of £30 for a first offence against the said section, whereas £10 is the maximum permissible pecuniary penalty for such first offence;

(3) alternatively to the first ground above, that the resident magistrate purported to convict of three offences arising out of the acts complained of and that the certificates of order comprised three convictions in respect of one offence;

(4) that it was not competent for the resident magistrate to impose three such convictions made under the section arising out of the same facts and that accordingly all the purported convictions were bad in law for uncertainty since it was impossible on the face of the certificates of order to know which, if any, of the convictions were proper in law.

The present application was to make the conditional order absolute notwithstanding cause shown.

MacDermott for the prosecutor.

Nicholson, Q.C. and *Lowry* for the justices.

At the conclusion of the arguments the Lord Chief Justice stated that the three convictions would be quashed and the conditional order made absolute, but that the court would give its reasons at a later date. In the following term their Lordships delivered judgments as follows.

LORD MACDERMOTT C.J.: On March 29, 1952, the prosecutor, William Raglan Pedlow Bowden (hereinafter referred to as the "defendant") was

involved in an accident while driving a motor car on the Beersbridge Road in the City of Belfast. This incident led to the issue of a summons against him on the complaint of Thomas Crozier, a District Inspector of the Royal Ulster Constabulary. The summons, which is dated May 9, 1952, contained three separate charges, each numbered and complete in itself. I need not recite them at length. Suffice it to say that the first was for driving recklessly, the second for driving at a speed dangerous to the public, and the third for driving in a manner dangerous to the public. It is common ground that all three charges arose out of the same occurrence. They were founded on the provisions of section 1 (1) of the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926, as amended by section 1 (1) of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934. For ease of reference I shall refer to this enactment hereinafter as section 1 (1) of the Act of 1934. The terms of this subsection are important. They read as follows:—

"(1) If any person drives a motor car on a public "highway recklessly or at a speed or in a manner "which is dangerous to the public, having regard "to all the circumstances of the case, including the "nature, condition and use of the highway, and "the amoumt of traffic which is actually at the time, "or which might reasonably be expected to be, "on the highway, he shall be liable—

"(*a*) on summary conviction to a fine . . . not "exceeding ten pounds or in the case of a "second conviction to a fine . . . not "exceeding twenty pounds, or in the case "of a third or subsequent conviction to a "fine . . . not exceeding fifty pounds, or, "in the discretion of the court, in the case "of any conviction under this section to "imprisonment for a period not exceeding "three months in addition to or in lieu of "any such fine as aforesaid;

"(*b*) on conviction on indictment to imprison-
" ment for a term not exceeding two years,
" or to a fine, or to both such imprisonment
" and fine.

" On the trial of any indictment for manslaughter
" in connection with the driving of a motor car, the
" jury may acquit the defendant of manslaughter
" and find him guilty of an offence under this
" section."

The case came on for hearing at Belfast Petty Sessions on June 12, 1952, when the resident magistrate convicted the defendant and fined him £10 on each charge, and, in addition, suspended his driving licence and disqualified him from obtaining a licence for eighteen months. An inspection of the order book shows that each charge was dealt with separately therein and that there were three distinct convictions. It also shows that in that relating to the charge of reckless driving the costs were fixed at 33 2d., while in each of the others the sum for costs is 2 -. The order as to suspension and disqualification appears only in the conviction for reckless driving. There is nothing in the entries or in any of the exhibited documents to show or to suggest that the defendant had ever been convicted of any motoring offence apart from those charged in the summons, and at the hearing before us this was accepted as indicative of the true position.

The defendant sought in these proceedings to quash all three convictions on the grounds—I summarise his contentions very briefly—that he should not, in point of law, have been convicted of more than one offence or fined more than £10.

At the conclusion of the argument an order was made for the quashing of the three convictions and, as the Trinity Term was then almost ended, we announced that we would give our reasons in writing after the Vacation.

The first question to arise was whether section 1 (1) of the Act of 1934 created more than one offence.

In *R. (Buck) v. Londonderry JJ.* (1), a case concerned with a similar question under section 2 of that Act, I expressed the view that section 1 (1) must now be taken as creating three offences and not one offence. On a reconsideration of the matter I am still of the same opinion. I think this enactment could well have been framed, without any loss of effectiveness, so as to constitute a single offence, and had that been done much difficulty and confusion might been avoided. For example, had the words " he shall be liable " been omitted in favour of the words" he shall be guilty of the offence of dangerous driving and be liable " the three alternatives would have been clearly descriptive not of three offences but of three ways of committing one offence. As the text stands, however, it seems to me that its language and the whole current of relevant authority are against a construction which would set up but a single offence. In *R. v. Wells* (2), the relevant enactment was section 1 (1) of the Motor Car Act, 1903, which provided that " if any person " drives a motor car on a public highway recklessly " or negligently, or at a speed or in a manner which " is dangerous to the public . . . " he should be guilty of an offence. It was there held that a conviction for driving a motor car " at a speed or in a manner " which was dangerous to the public " was bad for duplicity, and the whole basis of the judgments which were delivered was that the subsection from which I have quoted created not one but several offences. In *R. (Burrowes) v. Cavan JJ.* (3)—a decision I shall have to refer to again on another question—a conviction on a summons which charged the driver of a motor car with driving " recklessly, at a speed and in a manner which was dangerous to the public" was held good. There the court (Palles C.B., Gibson and Boyd JJ.) while distinguishing *R. v. Wells* (2) on the ground that in England, though not in Ireland, more than one offence could not be charged in the same summons having regard to the provisions of section 10

(1) [1952] N.I. 1.
(2) (1904) 68 J.P. 392.
(3) [1914] 2 I.R. 150.

of the English Summary Jurisdiction Act, 1848, was evidently content to follow that decision to the extent of holding that section 1 (1) of the Act of 1903 created not one but several offences. In *Beresford v. Richardson* (1) it was held that a conviction under the same enactment for driving in a manner dangerous to the public was sufficiently supported by evidence showing that the motor car concerned was being driven at a speed dangerous to the public on the occasion in question. But it seems clear from the judgments that the statute was regarded, none the less, as creating several offences. In *R. v. Jones* (2), the appellant was convicted of driving a motor car "recklessly and "at a speed which was dangerous to the public" contrary to the provisions of section 1 of the Act of 1903. It was held by a Divisional Court that as the driving of the car was one indivisible act which might constitute both the offences charged the conviction was not bad for duplicity. I am not quite clear how this ruling is to be reconciled with the provisions of section 10 of the Summary Jurisdiction Act, 1848. At the moment, however, that is not a material consideration. What is material is that Lord Coleridge, with whose judgment Avory and Salter JJ. agreed, said after a reference to section 1 of the Act of 1903 — "It is true that under that section, which defines four "separate offences, a person may be convicted of "driving recklessly, or of driving negligently, or of "driving at a speed which is dangerous to the public, "or of driving in a manner which is dangerous to the "public." In *R. v. Surrey JJ.* (3), the disjunctive wording of section 12 of the English Road Traffic Act, 1930, "without due care and attention or without "reasonable consideration for other persons using "the road" was held to create two offences and not one, and a conviction which followed the terms of the section just quoted was declared bad for duplicity. Though this decision deals with a different statute and is therefore not directly in point it does, I think, lend support to the view that the enactment here in

(1) [1921] 1 K.B. 243.
(2) [1921] 1 K.B. 632.
(3) [1932] 1 K.B. 450.

issue constitutes more than one offence. And, finally, in *R. v. Wilmot* (1), a conviction on a count in an indictment, the particulars of which alleged that the accused " drove a motor car recklessly, or at a speed " or in a manner which was dangerous to the public " was quashed on the ground that the count was bad for duplicity in that it charged more than one offence in the alternative.

The next question for consideration may also be put in general terms. It is this—can a defendant be convicted of more than one of the three offences created by section 1 (1) of the Act of 1934 in respect of the same event or occurrence ?

Now, where each charge is the subject of a separate summons I think the answer, at any rate in many cases, should be in the negative if only because the character of these three offences is such that a conviction on one will, more often than not, found a good defence in the nature of a plea of *autrefois convict* to further proceedings on foot of the others. See *Wemyss v. Hopkins* (2). If, however, the charges preferred are all laid in the same summons some ground for the view that a conviction on all would be competent may be found in *R.* (*Burrowes*) *v. Cavan JJ.* (3); *R. v. Jones* (4). Before coming to these cases, however, it will be convenient to enquire whether, apart from authority, the terms of section 1 (1) of the Act of 1934 themselves afford an answer to the question under discussion.

In my opinion they do. Looking solely to the language of the subsection it seems to me reasonably plain that the legislature did not contemplate more than one conviction thereunder in relation to the same incident. I think this is apparent from the provisions of paragraph (a) as to penalties. The maximum fine is higher in the case of a second conviction and higher again in the case of a third or subsequent conviction. The purpose of this familiar device is clear enough. It

(1) (1933) 149 L.T. 407
(2) (1875) L.R. 10 Q.B. 378.
(3) [1914] 2 I.R. 150.
(4) [1921] 1 K.B. 632.

is to discourage the repetition of offences; and it does this by making the exigible penalty heavier in respect of an offence committed *after* the warning of an earlier infringement. It aims to make the way of the transgressor increasingly hard if he continues to err. And such being the object it is, in my opinion, impossible to read the words "second conviction" as capable of relating to the same occasion as that which produced the previous conviction. They must relate to an offence committed on a later occasion. And, similarly, the expression "third or subsequent con-"viction" must be read as referring to an offence committed after the time of the offence the subject of the second conviction. But if this be so, what is the scope of the phrase (to take that germane to the present instance) "on summary conviction to a fine "not exceeding ten pounds"? On the views just expressed this is the only part of paragraph (a) applicable to the event or occasion which has produced the first conviction under the subsection. But does this mean that it covers as many of the offences thereby created as the evidence pertaining to that occasion may establish? I do not think so. Read in the light of the disjunctive description of the offences which has gone before, this phrase, with its reference to "a fine" in the singular, seems to me to refer, according to the natural meaning of its language, to one offence and no more. If the legislature had intended to provide for several concurrent offences it could easily have said "on summary conviction to a fine or fines "not exceeding ten pounds in all." With the text as it is the maximum is fixed for one fine and, prima facie, that means one and not several convictions. Another indication of the view expressed may be found in the concluding words of the subsection which empower a jury on acquitting of manslaughter to return a verdict of guilty "of an offence under this "section." This use of the singular "an offence" seems to be in keeping with the general design of the subsection which, as I see it—(a) creates three offences capable of being committed on the same occasion by the same course of conduct; (b) contemplates that a

court of summary jurisdiction, if several of these offences are charged and proved in respect of the same incident, will choose that most appropriate in the circumstances on which to convict; and (c) enables a jury to exercise a similar discretion on an indictment for manslaughter. I appreciate that this view may lead to a strange situation where the summons alleges more than one of the offences. In most cases falling within the subsection a charge of driving in a dangerous manner should suffice for the protection of the public and the due administration of justice. But printed forms and rubber stamps appear to have spread the habit of charging two or all three offences and whenever this is done and there is no subsequent reduction of the number by way of withdrawal or amendment, the effect of the construction I favour thus far may be to produce a conviction on one charge and a dismiss on another or others no less clearly established by the evidence:—for example, the same event may thus result in a conviction for driving at a dangerous speed and a dismiss for driving in a dangerous manner. I see no escape from this difficulty as the subsection now reads. In law, no doubt, the contradiction is more apparent than real, for a dismiss on the merits may mean nothing more than that the accused, irrespective of what he did, cannot be validly convicted on a particular charge. Nevertheless, the effect is anomalous and confusing and I venture to hope that the legislature may see fit to recast the subsection so as to simplify the position and avoid this particular difficulty by substituting one wider offence for the three that now exist.

I now have to consider how this interpretation of the subsection may be affected by authority. That the words "second conviction" connote a conviction in respect of an offence later in point of time accords with the decision in *R. v. South Shields Licensing Justices* (1), and with the view expressed by this court in *R. (Buck) v. Londonderry JJ.* (2) (supra) on the

(1) [1911] 2 K.B. 1. (2) [1952] N.I. 1.

meaning of a similar phrase in section 2 (1) of the 1934 Act. But difficulty arises when one comes to *R.* (*Burrowes*) *v. Cavan JJ.* (1) (supra). There, the defendant was charged under section 1 (1) of the Act of 1903 with driving a motor car on the public highway "recklessly, at a speed and in a manner which "was dangerous to the public, contrary to the statute "in such case made and provided." After the hearing the justices made an order as follows: "Defendant "convicted and fined £1. Costs, £1 : 3 : 6. In "default to be imprisoned in Mountjoy Gaol for "fourteen days without hard labour unless said sums "be sooner paid." The court (Palles C.B., Gibson and Boyd JJ.) upheld the conviction as a good conviction in respect of each of the offences alleged. In the course of his judgment Gibson J., after holding that in Ireland a summons may validly contain several charges arising out of the same facts, then proceeds to deal with the contention that a conviction on any one charge made it impossible to convict on any of the others and on that he says this: "Assuming that, "if there had been separate prosecutions, the maxim "*nemo debet bis vexari pro eadem causa* would have "been applied after the first conviction, the complaint "here was like an indictment containing various "charges based on the same *causa*, viewed in different "penal aspects, on all of which a conviction may be "legitimate" (2).

I confess I find this case of *Burrowes* (1) a difficult decision. I do not think it can be satisfactorily accounted for merely by the difference between the English and Irish procedure which is stressed in the judgment of the Chief Baron and it seems to me there is much to be said for the criticism contained in O'Connor, Justice of the Peace, 2nd ed., Part 1, at page 218. Gibson J. founded a material part of his opinion on the analogy of an indictment containing various counts arising out of the same event. I think it is true to say that at one time it was not unusual to take a general verdict on all such counts and, where that was a verdict of guilty, to award but one punishment.

(1) [1914], 2 I.R. 150. (2) Ibid. 155.

That, however, is not now the practice. The modern procedure is to have a verdict and judgment on each count. I think that has, in fact, been the procedure since well before 1913, when *Burrowes'* case (1) was decided. See the judgment of Palles C.B. in *Ex Parte Stephens* (2), where he says in reference to an indictment for misdemeanour containing a series of counts: "If you have a general judgment and sentence upon "all, one bad count will vitiate the entire sentence— "that is *O'Connell's* case (3); but if the modern prac- "tice, since that case, is adopted, of entering the same "judgment and sentence separately upon each count, "then if one or more of the counts be invalid, it does "not affect the sentence, provided there is one good "count." But even if it be assumed that the analogy relied upon by Gibson J. is still sound and that it is true to say, as a general proposition, that courts of summary jurisdiction may record one conviction and one punishment in respect of a series of offences arising out of the same event, the question still remains whether in the case of a prosecution under a particular statute the terms of the enactment permit a conviction on more than one of the related charges. It is to be observed that throughout the judgments and arguments as reported in *Burrowes'* case (1) there is no reference on this point to the terms of the Act of 1903; and even if there had been it would not, I think, be difficult to distinguish them from the provisions of the enactment with which we are now dealing. Section 11 of the Act of 1903, which relates to penalties and applies to section 1 (1) thereof, says that a person guilty of an offence "shall be liable on summary con- "viction in respect of each offence to an fine not "exceeding £20, or in the case of a second or subse- "quent conviction to a fine not exceeding £50 . . . ." I am not at all clear that section 11 was ever intended to justify the form of order upheld in *Burrowes'* case(1).

(1) [1914], 2 I.R. 150.
(2) (1889) Judgments of the Superior Courts in Ireland, 297, 312.
(3) (1844) 11 Cl. & F. 155.

All I say is that if the decision in that case conforms with the provisions of section 11 of the Act of 1903 I am not prepared to take the further step and say that it would also conform with the provisions of section 1 (1) (a) of the Act of 1934. In my opinion there is nothing in *Burrowes'* case (1) to modify the view I have already reached, apart from authority, as to the proper construction of section 1 (1).

In *R. v. Jones* (2) the summons, also under section 1 (1) of the Act of 1903, was for driving a motor car on the highway "recklessly and at a speed which was "dangerous to the public." The conviction was in similar terms. The decision upholding it seems to have turned on the circumstance that the defendant's act—I quote from Lord Coleridge's judgment—"was "one and indivisible—the act of driving which might "be both reckless and at a speed dangerous to the "public." I should have thought that one possible explanation of the decision was that the words "and "at a speed which was dangerous to the public" were to be regarded as mere descriptive surplusage, but there is no hint of that in the judgments. Apart altogether from the difficulty to which I have referred of reconciling this decision with section 10 of the Summary Jurisdiction Act, 1848, it puts the matter no further than *Burrowes'* case (1) and does not seem to me to have any bearing on the correct interpretation of the enactment relevant here.

It remains to observe on this branch of the matter that even if, contrary to the view I have formed, the defendant could have been validly convicted of all the three offences with which he was charged, this would not justify three convictions each imposing the maximum penalty of £10. Whatever else may be said of *Burrowes'* case (1) and *Jones'* case (2) there is nothing in them to challenge the decision in *R. v. South Shields Licensing Justices* (3) (supra) or the conclusion I have already expressed to the effect that the provisions of paragraph (a) of section 1 (1) of the Act of 1934 which are applicable to a first offence, are

(1) 1914, 2 I.R. 150.
(2) [1921] 1 K.B. 632.
(3) [1911] 2 K.B. 1.

the only provisions applicable to the occasion out of which that offence arose. In other words, whatever the number of convictions that occasion may yield, it cannot produce a fine of more than £10.

If I am right in my conclusions thus far the result is that the learned resident magistrate acted in excess of jurisdiction and was wrong in law, not only in fining the defendant more than £10, but in convicting him of more than one offence. The next question, accordingly, is as to the effect of a conviction on all three charges. Must this court say that all are bad, because two are bad, or can it discriminate between the convictions and hold one to be good and the others bad?

That this court is not powerless on certiorari in such circumstances, though each of the separate convictions is good on its face, cannot, I think, be doubted. See *Reg.* (*Daly*) *v. Cork JJ.* (1). But neither that case nor any of the others cited in the course of the argument affords much guidance on the question I have just stated. In *Daly's* case(1) the Irish Land Commission had summoned the defendant for trespass by goats. There was one summons alleging eight trespasses on eight different days. The justices made eight separate orders, each imposing a fine and 5/- costs. It was held by O'Brien L.C.J. and Gibson J. (Murphy J. dissenting) that there was but one "case" for the purposes of section 22 (9) of the Petty Sessions (Ireland) Act, 1851, and accordingly that, the aggregate costs awarded being in excess of the limit of 20/- thereby allowed, the orders should all be quashed. Each of the orders was regular on its face, but the question whether one or more of them, up to the number of four, might have been saved does not seem to have been raised and is not considered in the judgments. In *Dorrian v. McHugh* (2), the defendant, a publican, was charged with selling liquor during prohibited hours and also with opening his premises for sale during such hours. The justices convicted

(1) [1898] 2 I.R. 694. (2) [1907] 2 I.R. 564.

upon both charges, but as the selling and opening were part of the same transaction and occurred on the same occasion it was held by the King's Bench that the first conviction should stand and that the second should be quashed. The relevant portion of the judgment of Andrews J. will be found on page 573 of the report. It reads as follows: "I am therefore of "opinion that the appellant was liable to be con- "victed upon either of the summonses referred to in "the case stated, but that he ought not to have been "convicted on both, as in substance and reality there "was only one offence; and by the second conviction "and the sentence thereon he was punished a second "time for what in this case was in substance the same "offence; and the second conviction ought to be "quashed". Now as that passage indicates, each of the charges was the subject of a separate summons. The decision, therefore, was really an application of the principle enunciated in *Wemyss v. Hopkins* (1) (supra) and is not on all fours with the present instance, where there was but one summons. This is not to say that that principle can never be called in aid if several charges are raised in the same summons. I desire to guard against being understood to assert any such general proposition. If, for example, one of the charges in such a summons is dealt with and the others are adjourned I know of no good reason why the principle should not be invoked on the adjourned hearing if the facts warrant it. In circumstances like that one can point (as the court in *Dorrian's* case apparently found no difficulty in doing) to a *previous* conviction or acquittal, as the case may be. See also *Reg. v. Grimwood* (2). But in cases like the present, with one summons and one adjudication, I think there may be difficulty in establishing a sequence in point of time for the convictions without resorting to methods which are arbitrary and over-refined. Here all the charges were heard together and dealt with by the resident magistrate in court in one judgment. Moreover, the entries in the order book establish no clear

(1) (1875) L.R. 10 Q.B. 378. (2) (1896) 60 J.P. 809.

priority as between the convictions; indeed if they can be taken to suggest anything it is that the entry relating to reckless driving was, in fact, made last of the three, for it is to be found signed and stamped in a later part of the book.

Reference was also made on this aspect of the matter to *R.* (*Geraghty*) *v. Dublin JJ.* (1), and to *R. v. Rawson* (2). I do not think the former of these cases throws much light on the subject and I need not refer to it further. In the latter, the defendant was charged in one summons with cruelty to four ponies within a stated period. He was convicted and four convictions were drawn up, one for each pony. Three of these convictions imposed a fine of £5. The fourth imposed a fine of £5 and, in addition, costs to the amount of £4 : 1 : 0. It was held that as only one offence had been charged there could not be four convictions, and three of the four were accordingly quashed. In concluding his judgment, which was concurred in by Darling and A. T. Lawrence JJ., Lord Alverstone C.J. used these words (3): "In my opinion, therefore, there should in "this case have been only one conviction, but it does "not follow that all the four convictions are bad. "The justices held on the evidence that it had been "proved to their satisfaction that the defendant did "ill-treat each of the four ponies. Each of the con- "victions refers to a "pony"; one of the convictions "is, therefore, a good conviction, and none the less "so because there are three other convictions which "are bad. In our judgment the proper course is to "make the rule absolute for a writ of certiorari to "quash three of the convictions, including the one which "ordered the payment of costs." The difficulty of this decision, as reported, is that it does not reveal how the conviction which was to stand was to be selected.

It was, however, clearly the opinion of the court in *Rawson's* case (2) that the conviction which in fact

(1) (1901) 35 I.L.T.R. 136; 1 N.I.J.R. 172.
(2) [1909] 2 K.B. 748.
(3) Ibid. 752.

weighed most against the defendant, namely, the conviction with costs, should fall. I do not think the reason for this can be found in the acknowledgment of some general principle to the effect that, in such circumstances, the choice, if choice there must be, should be that most favourable to the convicted person. From the report of the argument it seems more likely that the reason was that the sum of £4 : 1 :0 for costs included the costs of all four convictions, for it was conceded that the full amount of costs could not stand if but one conviction were upheld. But even if there be such a principle as that just mentioned I do not see how it could be applied to the present case, for how is one to distinguish here between the two less onerous convictions which did not suspend the licence or disqualify the defendant, that is to say, between the convictions for driving in a dangerous manner and driving at a dangerous speed? Certiorari offers no satisfactory means of exploring the merits. We have nothing to guide us in upholding one but not the other of these two convictions; to attempt to do so would involve either a process of speculation or a decision by chance, both of which would be alien to the practice and tradition of this court.

That, however, is not to say that this court, if confronted with a series of convictions, all good on their face, but only one of which can have been made with jurisdiction, may never select one and hold it valid while quashing the others. It seems possible, for example, that a judicial selection might sometimes be founded on the legal nature of the offences charged, particularly in cases where one of the offences can be regarded as dominant in the sense that the others follow from its commission and are really ancillary. But I do not think one can discriminate on any such basis here. The legal character of the three charges gives none of them undisputed pre-eminence. Though the offence of reckless driving is popularly regarded as the most serious, it is not the dominant offence, as I have used that expression, because it does not necessarily mean that both the other offences have

been committed; one may drive recklessly without also driving at a speed which is dangerous to the public.

In support of his contention that if only one of the three convictions could be upheld it should be that which fined the defendant £10 for reckless driving, suspended his licence, and declared him disqualified for a period of eighteen months, Mr. Lowry, for the justices, laid more stress on the views expressed by the resident magistrate when giving judgment, as recorded in the affidavit of Head Constable Samuel Kirkpatrick, who conducted the prosecution on behalf of the complainant in the court below. The material paragraph of this affidavit, which was filed by the Chief Crown Solicitor on behalf of the justices, reads as follows:

> "When the evidence had concluded the learned "Resident Magistrate in delivering judgment said "that this was one of the worst cases of reckless "driving that had come before him, and that he "would deal with it accordingly, and that it was very "fortunate that nothing was coming in the opposite "direction. He then said 'I don't want to know "'if the defendant has any previous convictions "'or anything regarding his previous motoring "'record.' He said that he had found all three "counts in the Summons proved and continued 'I "'will convict on each count as follows. Count "'I—for driving recklessly I convict and fine the "'defendant a sum of £10 : 0 : 0. Count II— "'for driving at a speed I convict and fine £10 : 0 : 0. "'Count III—for driving in a manner I also convict "'and fine £10 : 0 : 0. In addition I will suspend "'his driving licence and disqualify him from "'obtaining a licence for a period of 18 months."

Now if the resident magistrate had been dealing with a second or subsequent conviction to which paragraph (1) of the proviso to section 4 (1) of the Act of 1926 (as amended) applied, suspension of the licence would have been mandatory and a strong case could no doubt, have been made in support of the conviction

for reckless driving as the only one of the three to comply with the law as to penalties. And again, if the resident magistrate had, in the course of a satisfactory adjudication, indicated simply that the facts appeared to him to justify the suspension of the licence in the exercise of his statutory discretion, it might well be that this court, recognising as it must that the magistrate is the judge of fact, would be entitled to regard his view of the appropriate penalty as relevant to the question whether the conviction imposing the suspension should fall with the others or be upheld.

As I see it, however, the present case does not raise considerations of this kind. There is no previous conviction to be taken account of and the facts revealed do not, in my opinion, indicate a satisfactory process of adjudication or a state of affairs which should lead us to adopt the course under discussion and uphold the conviction for reckless driving. If the affidavit correctly sets out what the resident magistrate said I am at a loss to understand his attitude concerning the punishment to be inflicted. If the case was one of the worst in his experience that would have been all the more reason why the defendant's motoring record, if bad, should have been considered, if only for the purpose of knowing whether to return him for trial or inflict a sentence of imprisonment. If, on the other hand, the defendant's previous motoring record was good I find it difficult to see on what ground that could be regarded as irrelevant or unimportant on the question of punishment. I can understand a good record making no difference in the end. The facts of the offence under investigation may be held to outweigh it. But I cannot understand how that can be determined judicially—and particularly if suspension or disqualification is in mind—by a magistrate who refuses to be informed as to what the defendant's motoring record has actually been. In the light of that attitude I do not think it would be right to discriminate between the convictions on the strength of what the resident magistrate said in this case. I do not see how this court can be guided to a judicial selection by a conclusion which was not judicial in

that it was, to all appearances, reached in disregard of one of the essentials of justice, namely, that an accused person should be free to put before the tribunal that is trying him such facts as are relevant to his punishment and admissible in point of law.

In the result, I have been unable to find any satisfactory reason which would justify the court in choosing between the convictions for the purpose of confirming one and quashing the others. Because of this, and as the convictions could not all stand, I arrived at the conclusion already announced, namely, that all three of them should be quashed.

Black L.J.: Section 1 (1) of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934, like the various similar statutory provisions which have preceded it dating back to the Motor Car Act, 1903, is aimed at curbing dangerous driving of mechanically propelled vehicles on public highways. The subsection makes it a criminal offence to drive a motor car on a public highway either recklessly or at a speed dangerous to the public or in a manner dangerous to the public. An offence under the section may be committed by driving in any one of these three ways. But it is obvious that it may often happen that a person driving a motor car may be fairly described as driving it in more than one of these three specified ways. He may at one and the same time be driving it both at a speed dangerous to the public and in a manner dangerous to the public. Or he may be driving it both recklessly and either at a speed dangerous to the public or in a manner dangerous to the public. Or he may be driving it in a way to which all three of the descriptions apply. What the proper course to be taken by the courts may be when either two of the descriptions or all three can justly be said to apply to an act of driving is curiously enough not quite clear on the authorities. It may be taken as well established since *R. v. Wells* (1), a decision which has

(1) (1904) 68 J.P. 392.

frequently been followed, that a conviction referring to any two or all three descriptions of the types of driving mentioned in the subsection and professing to convict the defendant of either two or all three of the types disjunctively, e.g., a conviction for driving at a speed or in a manner dangerous to the public—is bad for uncertainty. This is said to be on the ground that the subsection describes three separate offences. On the other hand there are several cases in the books, the authority of which cannot lightly be disregarded, in which it has been held that a conviction for two or three of these types of driving if expressed conjunctively is valid. Thus in *R.* (*Burrowes*) *v. Cavan JJ.* (1), a Divisional Court consisting of Palles C.B., Gibson and Boyd JJ. upheld a conviction under section 1 (1) of the Motor Car Act, 1903, for driving a motor car recklessly at a speed and in a manner dangerous to the public. So too in *R. v. Jones* (2), a court, consisting of Lord Coleridge, Avory and Salter JJ. upheld a conviction for driving recklessly and at a speed which was dangerous to the public. And in the subsequent case of *R. v. Surrey JJ.* (3), Avory J. refers to *R. v. Jones* (2), and cites it as an authority for what was decided in it. The same view also appears to be taken in Scotland. From the report of *Harris v. Adair* (4) no one seems to have questioned in that case the validity of a conviction under section 11 of the Road Traffic Act, 1930, for driving a motor car recklessly and at a speed and in a manner dangerous to the public. It is perhaps difficult to follow all that was said in *R.* (*Burrowes*) *v. Cavan JJ.* (1). *R. v. Jones* (2), however, is a striking case in view of the English rule that not merely must a conviction be for only one offence but also (as expressly provided by section 10 of the Summary Jurisdiction Act, 1848) that the complaint or information which initiates the proceedings must charge one offence or matter of complaint only. If there was any technical flaw in either the summons or the conviction it is difficult to think that it would have escaped the

(1) [1914] 2 I.R. 150.
(2) [1921] 1 K.B. 632.
(3) [1932] 1 K.B. 450.
(4) [1947] S.C. (J) 116.

attention of the judges who decided *R. v. Jones* (1) or the judges in the subsequent case of *R. v. Surrey JJ.* (2). Avory J. was a member of both courts. Few judges have had so wide an experience of this branch of the law, and it is to be recollected that he had been counsel for the defendant in *R. v. Wells* (3), the leading case in which a conviction under section 1 of the Act of 1903 expressed disjunctively had been successfully attacked in the first year in which that Act came in to operation. Without attempting to reconcile all that has been said in the cases I think that the actual decisions point to the conclusion that not only may a person be charged and convicted of driving a motor car on a public highway in any one of the three ways mentioned in section 1 (1) of the Act of 1934, but that he may also in an appropriate case be validly charged and convicted (in one proceeding leading to a single conviction) on a charge of driving in any two or in all three of those ways.

However this may be I am satisfied that on a fair reading of the subsection the Legislature simply intended that a blameworthy act of driving of any of the types mentioned in the subsection could lead to a prosecution and the imposition of a penalty, but never intended that a single act of driving should render the guilty person liable to more than one conviction or more than one penalty if it chanced that more than one of the three descriptions in the subsection could legitimately be applied to it. To hold otherwise would I think be contrary to the spirit of our law. The approach of the courts to such a proposition is indicated in such cases as *Wemyss v. Hopkins* (4); *Dorrian v. Mc Hugh* (5) and *Duncan v. Smith* (6). It is significant that we were not referred to a single instance, since the first introduction almost half a century ago in the Motor Car Act, 1903, of the provision of which section 1 (1) of the Act of 1934 is the

(1) [1921] 1 K.B. 632.
(2) [1932] 1 K.B. 450.
(3) (1904) 68 J.P. 392.
(4) (1875) L.R. 10 Q.B. 378.
(5) [1907] 2 I.R. 564.
(6) [1951] S.C. (J) 1.

latest manifestation, in which it was sought to uphold under such a provision two convictions or two penalties in respect of a single act of driving. Accordingly I am clearly of opinion that the three convictions with the three penalties imposed by the resident magistrate in the present case cannot all be allowed to stand.

It is contended, however, on behalf of the defendant that in these circumstances all three convictions should be set aside. I find myself unable to accept this contention. The charges against the defendant (a) of driving recklessly; (b) of driving at a speed dangerous to the public, and (c) of driving in a manner dangerous to the public, were charged as three separate offences in one summons. They were entered in the order book as three separate charges. The three charges were all heard together and three separate convictions were recorded. It is conceded that the conviction on any one of the charges if it stood alone would have been valid and unimpeachable. The resident magistrate is established by the Legislature as the judge of fact. Having heard the evidence he came to the conclusion that the defendant was guilty of driving both (a) recklessly and (b) at a speed dangerous to the public and (c) in a manner dangerous to the public. It is not open to question that the facts of the case may have warranted this conclusion. Where the learned resident magistrate went wrong was to record three separate convictions and impose three separate penalties. If this court quashed any two of the convictions one would be left standing against which nothing could be said. I fail to see how the fact that only one of the three convictions ought to have been recorded can have the effect of rendering all three invalid and thereby entitling the defendant to escape punishment on any of the three separate charges laid against him although he has been adjudged by the tribunal of fact to have been guilty of an act of driving which offended in every one of the three ways specified in section 1 (1) of the Act of 1934. No question of uncertainty or ambiguity arises as in *R. v. Wells* (1) and the cases which followed it. The

(1) [1904] 68 J.P. 392.

defendant has been left in no doubt of what has been found, and if this court removed two of the convictions the remaining one would be justified on the resident magistrate's findings of fact and would be clear and unequivocal.

No authority was cited at the Bar in support of the defendant's contention, and I would respectfully suggest not only that it is unsound in principle but also that there is a substantial body of authority against it. In *Eddleston v. Barnes* (1) two informations had been laid in respect of the same act as transgressing two separate orders of justices. Both cases were heard on the same day, and on exactly the same evidence the justices convicted on each of the two charges. On an appeal by way of case stated the Exchequer Division quashed one of the convictions and confirmed the other. In *Dorrian v. McHugh* (2), a licensee was convicted on two charges of (a) selling intoxicating liquor at prohibited hours and (b) opening for sale during prohibited hours. On case stated it was held by the King's Bench Division that both convictions could not stand inasmuch as the selling and the opening for sale were part of one and the same transaction. The court accordingly quashed the conviction for opening for sale during prohibited hours, but affirmed the conviction for selling at prohibited hours. The same point had arisen in the earlier case of *R.* (*Geraghty*) *v. Dublin JJ.* (3) in which the defendant had been convicted on two charges under the Food and Drugs Acts of exposing for sale and of selling margarine as butter. The case was ultimately decided in favour of the defendant on the ground that the prosecutions were out of time, but on the hearing Palles C.B. observed (as reported in the New Irish Jurist Reports) : " The quashing of the conviction for " sale is not an answer to the charge of exposing for " sale ". No doubt in each of these cases there appears to have been a separate summons relating to each of

(1) (1875) 1 Ex. D. 67.
(2) [1907] 2 I.R. 564.
(3) (1901) 35 I.L.T.R. 136. 1 N.I.J.R. 172.

the two offences with which the defendant was charged, whereas in the present case, as I have already mentioned, the three offences were charged in one summons, as may legitimately be done in Ireland. I do not think this makes any difference. The function of a summons is simply to compel the defendant's attendance at the court and to inform him of the charge or charges against him. In the present case the three charges were entered in the court books and dealt with as three separate charges, just as would have been done if three separate summonses had been issued. A still stronger case is *R. v. Rawson* (1). In that case the defendant was charged on one summons with having ill-treated four ponies. The justices convicted him and fined him £5 for each pony, and four different convictions were drawn up each imposing a penalty of £5. On application for a writ of certiorari the King's Bench Division held that as the summons and information charged one offence only the defendant could not, without notice of a charge of the other offences, be convicted of four offences. The court accordingly quashed three of the convictions but allowed the other to stand. The precise point now in issue was clearly raised and decided in this case. From the report in Justice of the Peace Reports it appears that Lord Alverstone C.J. intervened during the argument with the question, " Must not one of the " convictions be good ? " and counsel for the defendant replied, " No ; for no one can say which conviction is good." And in his judgment as reported in the Law Reports (2) Lord Alverstone says " In my opinion, " therefore, there should in this case have been only one " conviction, but it does not follow that all the four con- " victions are bad . . . One of the convictions is therefore " a good conviction, and none the less so because there " are three other convictions which are bad. In our " judgment the proper course is to make the rule " absolute for a writ of certiorari to quash three of the " convictions."

(1) [1909] 2 K.B. 748; 73 J.P. 483.

(2) [1909] 2 K.B. at 752.

These authorities confirm me in the view that in the present case the court should quash only two of the convictions and should allow the third to stand. The question then is put, which one of the three convictions should be allowed to stand. I find no difficulty in regard to this. Any one of the three convictions taken by itself is perfectly good. I do not think that any question of order arises as the three charges were heard together and the three decisions were pronounced together. I think this court is entitled to select any of the convictions it chooses as the one which should be permitted to stand. It is not fettered as the court was in *R. v. Rawson* (1). In that case as clearly appears from the report at 22 Cox 173, all the costs (including costs referable only to the other convictions) had been imposed in one of the convictions, and accordingly that conviction had obviously to be one of the three which had to be quashed. In the present case the resident magistrate considered after hearing the evidence that not only should the defendant be punished by fines but that he should be disqualified for a period of 18 months from holding a driving licence, an order which the Legislature has in the public interest empowered the resident magistrate to make. Taking the view that he was entitled to record three separate convictions the resident magistrate only imposed the order of disqualification in one. Presumably he thought it would have seemed an absurdity to direct the same disqualification three times over. I think this court should accept the determination of the resident magistrate who heard the evidence in the case that the facts were such as to call for an order of disqualification. Accordingly I am of opinion that the proper course for this court would be to allow the conviction for driving recklessly to stand as this was the conviction on which the order for disqualification was made and to quash the convictions on the charges of driving at a speed and in a manner dangerous to the public.

(1) [1909] 2 K.B. 748; 22 Cox. C.C. 173.

A point was sought to be made on behalf of the defendant at the hearing in this court founded on the observation of the resident magistrate as set out in the head constable's affidavit, that he did not want to know if the defendant had any previous convictions or anything regarding his previous motoring record. I entirely agree that before deciding on the sentence which he should impose the learned resident magistrate ought to have informed himself as to whether the defendant had had any previous convictions for motoring offences. I interpret his remark, however, as simply meaning that he had decided that the proper fine to impose was what he conceived to be the maximum fine for a first offence, and that he was content to treat the case as a first offence. If this is the true explanation—and it seems to me the most plausible one—I do not see that the resident magistrate's observation gives the defendant any reasonable cause of complaint. In any event it does not appear relevant to any of the grounds on which the defendant obtained the conditional order. The contention in the conditional order is "that all the purported convictions "are bad in law for uncertainty since it is impossible "upon the face of the certificates of order to know "which, if any, of the said convictions is proper in "law." No suggestion here is made that the learned resident magistrate did not act judicially. If it had been proposed to attack the convictions on that ground the point ought to have been raised in the conditional order so that the resident magistrate could have been called upon to meet it. He might quite conceivably have filed evidence which would have constituted a complete answer to such a charge. As it was, the case was left to be fought out on the grounds set out in the conditional order. Confining myself as I think I am bound to do to those grounds I simply answer that whichever two of the convictions are quashed the third will remain quite unimpeachable, that in my view both on principle and authority all three convictions cannot be bad and one of them ought to be allowed to stand, that if there were no considerations pointing to one of the convictions

rather than the others this court would be justified in selecting any one of the three it chose, and quashing the other two, but that in the circumstances of the case I consider that the conviction which should be allowed to stand is the conviction on the charge of driving recklessly.

Sheil J.: I agree with the judgment of the Lord Chief Justice.

It may be, though I am not satisfied that the authorities cited are conclusive on the point, that this court has to select one of several convictions to be upheld, but for the reasons stated by my Lord in the concluding portion of his judgment, I am of opinion, in this case, that all the convictions should be quashed.

Order absolute.

Solicitor for the prosecutor: *H. J. Catchpole.*

Solicitor for the justices: *Chief Crown Solicitor.*

S. M. M.

McCORMICK v. HARLAND & WOLFF LTD. (1).

Costs—Jury action Payment into court with admission of liability Amount awarded less than sum paid in Costs to follow the event Judicature (Ireland) Act, 1877 (40 & 41 Vict., c. 57), s. 53 R.S.C. Or. 22, r. 11, Or. 65, r. 1.

In an action under the Fatal Accidents Acts, 1846-1908, the defendants paid £1,879 18s. 0d. into court with an admission of liability. The plaintiff refused to accept this sum and proceeded to trial by a jury. At the trial the only question submitted to the jury was the assessment of damages and their apportionment between the defendants. The jury assessed the damages at £1,860.

By the Judicature (Ireland) Act, 1877, s. 53 and the Rules of the Supreme Court the costs in every action, question and issue tried by a jury shall follow the event unless for special cause shown and mentioned in the order the judge shall otherwise direct.

Held, that the "question" tried by the jury was the sufficiency of the lodgment in court, notwithstanding that the fact and the amount of lodgment could not have appeared in the pleadings or been communicated to the jury; and that as the "event" was in favour of the defendants the trial judge had no jurisdiction to award the plaintiff the costs of the action after the date of lodgment in the absence of such facts as would support a finding of special cause for so doing.

Per Black L.J.: The word "issue" in this context means not the issue submitted to the jury at the trial but an issue set down to be tried formally, such as an interpleader issue. The "event" of an action may be complex: some issues submitted to the jury may be decided in favour of the plaintiff and some in favour of the defendant. The effect of the rule is not that the party succeeding in the action as a whole is to be entitled to the whole of his costs of the action, but that each party is entitled to the costs of any separate issues found in his favour.

Decision of Lord MacDermott C.J. reversed

ACTION tried before Lord MacDermott C.J. and a special jury.

The plaintiff Elizabeth McCormick, widow and administratrix of Allan McCormick deceased, brought this action in respect of the death of her husband which she alleged was caused by the negligence and

(1) In the King's Bench Division before Lord MacDermott C.J., Dec. 21, 1951. In the Court of Appeal before Porter and Black L.JJ. and Sheil J., Feb. 25, 26, 27, 28, 29, July 31, 1952.

breach of statutory duty of the defendants. Damages were claimed on behalf of the estate of the deceased under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, and on behalf of the plaintiff and her children under the Fatal Accidents Acts, 1846-1908. The defendants in their defence admitted negligence but denied any breach of statutory duty : they further denied that either the plaintiff or her children were dependent on the deceased or that they had suffered any loss or damage. The defendants paid into court a sum of £350 in respect of the claim under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, and a further sum of £1879 : 18 : 0 in respect of the claim under the Fatal Accidents Acts, 1846-1908. The notice of lodgment of these sums expressly admitted liability for the claims.

The plaintiff accepted and drew out the money lodged in respect of the claim under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, but refused to accept the sum lodged in respect of the claim under the Fatal Accidents Acts, 1846-1908, and the case therefore proceeded to trial.

At the trial the defendants admitted that the plaintiff and her children had suffered damage, and the only question submitted to the jury was the assessment of damages and their apportionment between the plaintiff and her children. The jury assessed the damages at £1860 and duly apportioned this sum.

After verdict argument was heard on the question of the form of the order and the question of costs.

McSparran K.C., *Nicholson K.C.* and *Lowry* for the plaintiff.

Jones K.C. and *Blair* for the defendants.

Cur. adv. vult.

Lord MacDermott C.J. : The plaintiff brought this action as administratrix of her husband, Allan McCormick, to recover damages in respect of his death under the Law Reform (Miscellaneous Provisions)

Act, 1937, and also under the Fatal Accidents Acts, 1846-1908.

The accident out of which the action arises occurred on January 31, 1951, when the deceased was leaving a ship called the 'Juan Peron,' which had been built by the defendants. The gangway which the deceased was using broke and collapsed, and he suffered injuries from which he died the same day.

The plaintiff sued under the Fatal Accidents Acts on behalf of herself and her two children, Margaret aged 19, and William who is now aged 14. By their defence delivered the 25th June, 1951, the defendants admitted they were guilty of negligence causing the accident as alleged in the statement of claim, but denied that the plaintiff or any of the persons on whose behalf this claim was brought, were dependent upon the deceased or had suffered the alleged or any loss or damage. This, though an admission of negligence, was a denial of liability. On the same day the defendants served notice of having paid into court the sum of £2,229 : 18 : 0. This notice stated that of this sum £350 was enough to satisfy the plaintiff's claim under the Law Reform Act, and that the balance of £1,879 : 18 : 0 was enough to satisfy the plaintiff's claim under the Fatal Accidents Acts. The notice ended with an admission of liability clearly applicable to both limbs of the claim. This, no doubt, was done to conform with rule 1 (3) of Order 22, which requires that the notice "shall state whether liability is admitted "or denied." The corresponding rule in England is, it may be observed, now different. It is no longer necessary in that jurisdiction to specify in the notice whether liability is admitted or denied.

The plaintiff accepted the sum of £350 in satisfaction of her claim under the Law Reform Act and took that sum out of court. But she did not accept the sum lodged in respect of her claim under the Fatal Accidents Acts, and, the defendants having served notice of trial by a judge and special jury, the action proceeded to trial solely as a claim under those Acts.

On the pleadings it was open to the defendants at the hearing to avoid liability if they could on the ground that there was no dependency and no loss. As things happened, however, they did not seek to do so. They adduced no evidence, and Mr. Jones, in his address to the jury on their behalf, accepted the view that there was dependency and loss so far as the plaintiff and her son William were concerned. As respects her daughter Margaret, I think I am right in saying that Mr. Jones asked the jury to consider whether she was a dependant at all or not ; and he submitted that, if she was, the degree of dependency must in her case be very slight. It was agreed by counsel on both sides that the jury in arriving at the total damages must first deduct the sum of £320 : 2 : 0, this being the amount of the sum accepted in satisfaction of the claim under the Law Reform Act, less funeral expenses.

In these circumstances the only questions I left to the jury were as to the assessment of damages under the Fatal Accidents Acts and the apportionment thereof between the dependants. The jury found damages in the sum of £1,860, and of this they gave the widow £1,380, her daughter Margaret £80, and her son William £400.

Upon this verdict, Mr. Jones, relying on the notice of payment into court, which was then produced, asked me :

(*a*) to give judgment for the defendants on the claim ;
(*b*) to award costs up to the date of lodgment to the plaintiff and thereafter to the defendants ;
(*c*) to set off one set of costs against the other and to give judgment for the defendants for the balance ; and
(*d*) to pay to the defendants out of the sum in Court the sum of £19 : 18 : 0, being the amount by which the sum lodged exceeded the amount awarded, and to retain in court out of what was left sufficient to satisfy the costs payable to the defendants.

He submitted, in support of this application, that it was not relevant to the exercise of the court's discretion as to costs to enquire whether or not the plaintiff had acted reasonably in not taking out of court the money lodged in respect of the claim under the Fatal Accidents Acts, and he relied on the decision of the Court of Appeal in England in *Findlay v. Railway Executive* (1). He further contended that as the action had been tried by a jury costs should follow the event under section 53 of the Judicature (Ireland) Act, 1877, and Order 65, rule 1, the event having, as he argued, gone in favour of his clients.

For the plaintiff, Mr. McSparran, on the other hand, contended that the discretion of the court was absolute, and that, having regard to the facts and circumstances of the case, it should be exercised in her favour and so that she should have her costs of the action throughout against the defendants; that is to say, that the lodgment, and the fact that it was more than the sum ultimately found by the jury, should be disregarded in dealing with the question of costs. He referred to the terms of Order 22 and, in particular, to the provisions of rule 8 thereof requiring judicial approval, in the case of an infant's claim, before the acceptance of money paid into court.

In my opinion the defendants are not entitled to judgment on the claim as the Rules of Court now stand. The case might well have been different under the 1905 Rules, for under them payment into court, with denial of liability, could only be made if signified in the defence; and the result of doing that appears to have been to raise a special or alternative defence in respect of the cause of action to which the lodgment was directed: see *Wheeler v. The United Telephone Company* (2) and *Goutard v. Carr*, reported in a foot-note to that case (3). As Brett M.R. said in *Wheeler's* case (4), after referring to *Goutard v. Carr*: "In that "case I expressed an opinion that where payment into "court is allowed to be pleaded as an alternative

(1) [1950] 2 All E.R. 969.
(2) (1884) 13 Q.B.D. 597.
(3) Ibid. 598.
(4) Ibid. 613.

" defence, it is a defence to the action, in the sense that " if it succeeds the action is defeated. Whatever the " exact form of the defence may be in words, the sub- " stance of it is that the money is paid into court, and " the defence is pleaded as an alternative defence, " which means that if the defendant fails in the other " defences which he has set up, this is his defence to " the action. If it succeeds the result is the same as " if under the old system of pleading the jury had " found in favour of one plea which went to the whole " cause of action. In that case there would be verdict " and judgment for the defendant, but the plaintiff " would be entitled to the costs of issues raised by " the other alternative defences which had failed. " I am of opinion, therefore, that there ought to be " judgment for the defendants." And Bowen L.J. says (1), after referring to *Goutard v. Carr* : " When " such a defence as this is pleaded, and money is paid " into court, it was there decided that such payment " should be treated as a payment into court, according " to what was prescribed by Order XXX, of the Rules " of 1875. If this were not so the defence would be " incomprehensible, for why should anyone pay money " into court where he can gain nothing by it ? But " when the defendant has the benefit of what is treated " as an alternative defence there is some reason for " paying into court." See also what the same learned judge had said in *Goutard v. Carr* (2) : " That is how " payment into court stood until the Judicature Acts " and Order XXX, rule 1. That rule deals with pay- " ment into court ' by way of satisfaction or amends.' " Reading that with the light of section 71 of the " Common Law Procedure Act, 1852, it gives a defend- " ant power to pay money into court in satisfaction " and in bar of the plaintiff's claim, and such payment " is to be pleaded as a defence, and unless it can be " so pleaded I do not know the meaning of that rule 1."

But under the present Order 22 the procedure is quite different. Under rule 11 thereof the fact that money has been paid into court must not be revealed

(1) Ibid. 613. (2) Ibid. 601

in the pleadings and must not be mentioned at the trial either to judge or jury until all questions of liability and amount of damages have been decided. The statement of defence, instead of signifying the lodgment, now must not refer to it. It seems to me that the result of this change in the Rules is to abolish the special defence that previously existed. That being so, I think the ground for the former practice, whereby judgment was given for the defendants, has disappeared. In my opinion the intention underlying this change is reasonably clear. Payment into court is no longer to give an alternative ground of defence. It is to remain outside the issues joined between the parties and is not to be taken into account in determining those issues. Instead, it is to have such weight and effect as may be attached to it in the exercise of the judicial discretion as to costs. As it seems to me, the substance of the change is to be found reflected in the concluding words of rule 11, which, after referring to the exclusion of the fact of lodgment from the pleadings and directing that no communication about it is to be made to judge or jury, ends, "but the Judge shall, in exercising his discretion as "to costs, take into account both the fact that money "has been paid into court and the amount of such "payment." As it seems to me, that "but" is significant. The matter is no longer to appear in the pleadings: it is no longer to be a defence; it is to sound in costs as the judge in his discretion may determine.

This, however, is not enough to dispose of the defendants' application. Even though judgment, if I am right, may not be entered for them, the point as to discretion still remains, and so I turn next to the submission that in exercising my discretion I should not enquire whether the plaintiff was acting reasonably in refusing to accept the money lodged in respect of her claim under the Fatal Accidents Acts. I shall first consider this question apart from the provisions of section 53 of the Judicature Act as to jury actions.

One difficulty I find about this submission is that, if sound, it would fetter the power of the court as to

costs to such an extent as to empty the word "discretion" of much of its meaning. I think the language of rule 11 and the latter part of rule 4 (which is to the same effect) refers to an absolute discretion, and I believe it has generally been so regarded here and in England. But, if that is its nature, why should the court, in taking into account the fact that money has been paid in and the amount of such payment, not also consider the conduct of the plaintiff in failing to accept what was lodged? At the time when a plaintiff has to make a decision as to whether or not to accept a lodgment it may be possible to reach a reasoned conclusion as to whether the lodgment is one that should be accepted. On the other hand, it is also possible that at that time a plaintiff may not be in a position to reach such a conclusion. For example, in personal injury claims all may depend on a surgical operation still to be performed; while in death cases under the Fatal Accidents Acts, the quantum of damages may be so much at large as to make it impossible for a reasonable claimant, competently advised and anxious but not greedy about his compensation, to know what is best to be done. I think everyone who has practised at the Bar can remember cases of that kind. And if the dependants include minors the court itself may be faced with much the same problem if asked to approve the acceptance of the lodgment. If, however, the defendants' contention now under consideration is correct, genuine difficulties of this kind will not help the claimant who does not touch the lodgment and eventually gets a verdict for less. He is no better off than the claimant who ignores an obviously adequate lodgment: both have failed to take what was offered, and reasonable or unreasonable, both should be mulcted in costs in the same way

I find it hard to think that the Rules were ever intended to put reasonable people, seeking redress in a court of justice, on the horns of such a dilemma. In particular it is, I think, repugnant to the due administration of justice that a person suing to recover for an admitted wrong should find his rights reduced, or

it may be extinguished, because he has failed to take in the time allowed for taking it what was really then a step in the dark. No doubt it is proper that reasonable defendants should have a measure of protection, and that unreasonable plaintiffs should suffer for their unreasonableness; but if the contention under examination is to prevail what is reasonable becomes irrelevant and the hazards of litigation are increased unnecessarily and to no good purpose.

I do not find *Findlay's* case (1) any real support for the defendants' proposition. The Court of Appeal differed there from the trial judge as to how the discretion should be exercised, but I do not read the judgments as indicating that the discretion as to costs is other than absolute or that the existence of reasonable grounds for deciding against accepting a lodgment is not germane to the due exercise of that discretion.

I must now refer to a further ground on which the defendants rely in support of this proposition. It is to the effect that the verdict of the jury, having settled the proper measure of damages in authoritative fashion, has made any enquiry as to whether the plaintiff was reasonable or otherwise superfluous. The argument seems to be that as the jury has fixed what was right and fair the plaintiff was therefore at fault in not accepting more than what was right and fair. I do not think this follows. True it is that no one could say that the verdict under consideration was perverse. I do not think anyone could succeed in upsetting it. It was one which was open to the jury on the evidence. But even calling it reasonable and fair and all that such a verdict should be, does not necessarily conclude the matter against the plaintiff. Whether a person has acted reasonably or the reverse in any given instance must surely be judged of in the light of the surrounding facts and circumstances rather than in the light of a subsequent event; and all the more so where the subsequent event is the outcome of a form of judicial process which does not lend itself to any close forecasting. In my opinion

(1) [1950] 2 All E.R. 969.

the verdict does not preclude enquiry into the reasonableness or otherwise of not accepting the lodgment and such enquiry is, in my view, relevant to the exercise of the discretion as to costs.

I come next to section 53 of the Judicature Act and to the echoing terms of rule 1 of Order 65. That rule, as will be remembered, commits the question of costs generally to the discretion of the court. Then there is the proviso which reads : " Provided . . . that the costs "of every action, question and issue tried by a jury " shall follow the event, unless, upon application made, " the Judge at the trial, or the Court, shall for special " cause shown and mentioned in the order otherwise " direct." Now that certainly points to something which the jury has tried and to an event which is found according to some decision of the jury. It seems to me that if the lodgment is, for the reasons I have already indicated, no longer a defence to the action, then the question whether " the event " has favoured the plaintiff or the defendants must depend on the issues raised in the pleadings and not on the adequacy of the lodgment. Here, the jury did not find for the defendants on any ground of defence ; on the contrary they fixed them with liability, and none the less so because at the trial the defendants conceded what they had denied in their defence, that is to say, their liability. I am accordingly of the opinion that section 53 does not entitle the defendants to the costs they now seek. Indeed, as on the view taken the event has fallen in favour of the plaintiff, the costs should follow that event and be hers unless special cause to the contrary has been shown. I was not formally asked so to certify ; but the case made by the defendants as to how the discretion should be exercised under Order 22, rule 11 may perhaps be taken as coming to much the same thing, and if they do not succeed there they would not be entitled to a special cause direction under section 53. It, will therefore, be convenient to return to the discretionary aspect of the matter on the basis already indicated, namely, that the reasonableness or otherwise of the plaintiff

in not accepting the sum lodged is a relevant consideration.

How, then on the facts of this case (and assuming Order 22, rule 11 to be applicable) should the discretion as to costs be exercised? Though the amount awarded is unassailable, I do not think anyone could describe it as ample or generous. The evidence adduced on behalf of the plaintiff was not seriously challenged and may be taken as substantially correct. So regarding it I cannot imagine any responsible solicitor or counsel advising the plaintiff that she was unlikely to get more for herself and her children if she went on. For my own part, had the plaintiff sought the approval of the court to withdrawing the sum lodged I would have been slow to give such approval with a knowledge of the facts as revealed at the trial. I think I would have been satisfied that liability would be established without difficulty, and that the chances were that appreciably more would be recovered than was in court. I suppose no one could have said there was no risk at all of getting less than the sum lodged. But if there was such a risk I think it was not unreasonable to take it, and on the entire case I think it right to hold that the plaintiff was acting reasonably in deciding not to accept the lodgment but to have her rights and those of her children measured by the due and appropriate process of law. On this ground I would exercise my discretion in her favour. I think it would be unjust to make her and her children suffer for a reasonable decision.

I accordingly propose to order:—

1. That judgment be entered for the plaintiff for £1860, the amount of the verdict, with costs of suit to be taxed irrespective of the lodgment; and
2. That the balance of £19 : 18 : 0 be paid out to the defendants.

There is another aspect of the matter to which I should perhaps refer, although it is unnecessary to come to a conclusion on how it would affect the issue as to costs it if stood alone. As I have already pointed out, the payment into court was made the same day

that the defence was delivered. The defence, in effect, denied liability in respect of the Fatal Accidents Acts claim. On the other hand, the notice of payment into court admitted liability. The notice and the defence are therefore inconsistent and there is an irregularity in the situation as it is not right that contemporaneous documents, one by way of defence and the other under Order 22, should contradict each other. As was said by Lord Simon L.C. in *Bonitto v. Fuerst Brothers & Company Limited* (1): "The present is "the reverse situation, and the proper rule of practice "equally is that it is irregular for a defendant to deny "liability in his defence but to admit it in his notice "of payment in." There is, of course, good reason for noticing such an irregularity, where, as here, the fact of payment in is relied upon as conferring an advantage when one comes to the matter of costs, the reason being that a plaintiff faced with a lodgment in court has naturally to consider the possibilities of the whole situation, and these may be quite different according to whether or not liability is in issue on the pleadings.

Now, I am not clear that in this case the inconsistency has prejudiced the plaintiff to any appreciable extent, but the question which might arise is whether, the notice being irregular, the defendants can take advantage of the payment in, as they seek to do. In *Bonitto's* case (1) Lord Simon thought that generally it would be for the plaintiff to set the irregularity right. But here, as the defendants were relying on the lodgment, it seems to me that it was for them to put their house in order, and to cure the irregularity, if they could, by some interlocutory application. They did not do so, and if it were necessary to decide the matter on this ground, I would be inclined to hold that the payment into court was irregular because the notice was irregular, and that in consequence the defendants were not entitled to rely upon the lodgment. However that may be, I have decided the case on the broader grounds I have endeavoured to indicate, namely that section 53 favours the plaintiff, and that, in so

(1) [1944] A.C. 75, 84.

far as the discretion of the court is involved, it should be exercised for and not against her.

Judgment for the plaintiff for £1860 the amount of the verdict, with costs of the suit to be taxed irrespective of the lodgment; the balance of £19-18-0 to be paid out to the defendants.

The defendants appealed to the Court of Appeal.

Topping Q.C., Jones Q.C. and *Blair* for the appellants.

McSparran Q.C., Nicholson Q.C. and *Lowry* for the respondents.

Cur. adv. vult.

PORTER L.J.: This is an appeal from the judgment of the Lord Chief Justice in an action in which Elizabeth McCormick as administratrix of her husband Allan McCormick suing on behalf of herself and her two children, Margaret, aged 19, and William, aged 14, sought to recover damages under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, and the Fatal Accidents Acts, 1846–1908, for the death of her husband as the result of injuries caused by the negligence of the defendants, Harland & Wolff Limited.

By their defence the defendants admitted negligence but denied that the deceased Allan McCormick endured any shock, pain or suffering, or that his estate was put to any expense, loss or damage, or that the plaintiff or her children were dependent upon the deceased or suffered loss or damage. The defendants also served a notice stating that they had paid into court £2229 : 18 : 0, and that part of this sum viz., £350, was enough to satisfy the plaintiff's claim under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, and that £1879 : 18 : 0, the other part of the sum, was enough to satisfy the plaintiff's claim under the Fatal Accidents Acts, 1846–1908, and that they admitted liability therefor. The plaintiff

accepted and drew out the sum of £350 in satisfaction of her claim under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, but did not accept the sum of £1879 : 18 : 0.

The action proceeded to trial by the Lord Chief Justice and a special jury and as damage was admitted at the trial the only questions left to the jury were the assessment of the amount of damages and the apportionment of that amount under the Fatal Accidents Acts, 1846–1908.

The jury assessed the damages at £1860 and of this amount awarded the plaintiff £1380, the daughter Margaret £80, and the son William £400. Having heard the arguments of counsel the Lord Chief Justice ordered judgment to be entered for the plaintiff for £1860 with costs of the suit to be taxed irrespective of the lodgment, and that the balance of £19 : 18 : 0 be paid to the defendants.

Against this judgment the defendants have appealed on the following grounds :

1. That the Lord Chief Justice misdirected himself and was wrong in law in giving judgment for the plaintiff seeing that the sufficiency of the amount lodged in court, which was the only issue between the parties, had been found in favour of the defendants.

2. That the Lord Chief Justice misdirected himself and was wrong in law in giving the plaintiff the costs of the action after the date of the lodgment in court having regard to the fact that the event referred to in section 53 of the Supreme Court of Judicature Act (Ireland), 1877, that is to say, whether the money lodged in court was sufficient to satisfy the plaintiff's claim, was found in favour of the defendants and that no special cause was shown or mentioned in the order nor was any application made therefor, nor was a special order within the meaning of the said section made by the Lord Chief Justice.

3. That the Lord Chief Justice misdirected himself and was wrong in law in purporting to exercise or in exercising a discretion as to the costs after the date of lodgment.
4. That there was no material, or proper material, on which he could exercise his discretion as to the costs after the date of the lodgment.
5. That the Lord Chief Justice was wrong in exercising his discretion as to the costs after the date of the lodgment.

The notice of appeal asked that judgment should be entered for the defendants and that the costs of the plaintiff, up to the date of the lodgment, be ordered to be taxed and paid by the defendants to the plaintiff and that the defendants' costs, as from the date of the lodgment, be ordered to be taxed and paid by the plaintiff to the defendants, such costs to be set off one against the other and the balance to be paid to the party in whose favour such balance be found and that sufficient of the sum of £1860 : 0 : 0 be retained in court to meet any balance for costs which may be found in favour of the defendants and for the costs of and incidental to this appeal.

Holding that the defendants were not entitled to judgment under the present Rules of the Court, the Lord Chief Justice said that under the former Rules it might well have been different, because payment into court with a denial of liability had to be signified in the defence and was, therefore, a special or alternative defence to the cause of action to which the lodgment was directed, but since under Order 22, rule 11, the fact that money has been paid into court is not to be inserted in the defence or mentioned at the trial, payment into court is no longer a special or alternative ground of defence. It is not one of the issues joined between the parties, and is not to be taken into account in determining those issues, but, and the Lord Chief Justice lays great stress upon the word which occurs in Order 22, rule 11, " but the Judge shall in exer- " cising his discretion as to costs take into account

" both the fact that money has been paid into Court " and the amount of such payment."

The practice of paying money into court by way of satisfaction in actions of debt appears to have originated in the reign of Charles II. The proceeding was not entered upon the record, but was carried out by a rule of court embodying the terms upon which the defendant offered to confess the cause of action and make satisfaction. The plaintiff could accept the money in full satisfaction, take the money out of court and tax his costs up to the time of payment into court, but if he declined to accept the amount and proceeded to trial and failed to establish a claim exceeding the amount paid into court he was deprived of the whole costs of the action and the defendant had his costs of his defence: *Wheeler v. United Telephone Co.* per Williams J. (1).

This practice continued in England until 1833 and in Ireland until 1840 when by 3 and 4 Vict., c. 105, s. 46, the defendant was authorised by leave of the court in all personal actions (excepting assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation or debauchery of the plaintiff's daughter or servant) to pay into court a sum of money by way of compensation or amends, and by section 75 of the Common Law Procedure Amendment Act (Ireland), 1853, the right to pay money into court without asking the leave of the court was given to the defendant in all personal actions with the exceptions I have mentioned. The plea in such case was substantially as follows: " The defend- " ant brings into court the sum of £———— and says " that the said sum is enough to satisfy the claim of " the plaintiff."

Sections 76 and 77 of the latter Act deal with the acceptance and the payment out of the money, and section 78 provides that when the plaintiff declines to accept the money " the Sufficiency of the Payment " shall be tried upon the Issue raised for that Purpose

(1) (1884) 13 Q.B.D. 597, 604.

" by the said Defence, and in case of such Issue being " found for the Defendant the Defendant shall be " entitled to Judgment and his Costs of the Suit ".

This effected an alteration of the law in favour of the defendant, for under the 74th General Order of 1850, the plaintiff in such a case would have been entitled to his costs down to the date of the lodgment, whereas under section 78 of the Act he is deprived of these costs and the defendant gets the entire costs of the suit, and it was so decided in *Farmer v. Fottrell* (1) following *Rumbelow v. Whalley* (2), a case decided under the corresponding English provisions.

It was unfair that the plaintiff should be deprived of his costs down to the date of the lodgment, and in *Rumbelow v. Whalley* (2), Patteson J., in effect admitting the unfairness, said that the court was bound by the words of the English Order. So far as I am aware this continued to be the law down to the Judicature Acts, but in the meantime the Fatal Accidents Act, 1846, was amended in 1864 by 27 and 28 Vict., c. 95. Section 2 of that Act provides that " it shall " be sufficient if the Defendant is advised to pay " money into Court, that he pay it as a Compensation " in One Sum to all Persons entitled under the said " Act . . . without specifying the Shares into which " it is to be divided, and if the said Sum be not accepted " and an Issue is taken by the Plaintiff as to its " Sufficiency and the Jury shall think the same " sufficient the Defendant shall be entitled to the " Verdict upon that Issue ".

As the legality of a lodgment in court with a denial of liability was not established until the decision in *Berdan v. Greenwood* (3), the issue of sufficiency mentioned in section 2 was the only issue, and as the law then stood, the defendant, if successful on that issue, was entitled not merely to his costs as from the date of lodgment, but to the entire costs of the suit.

By Rule 30 of the Schedule to the Irish Judicature Act of 1877 the defendant was entitled to pay money into court in any action brought to recover a debt or

(1) (1858) 8 I.C.L.R. 228.
(2) (1851) 16 Q.B. 397.
(3) (1878) 3 Ex. D. 251.

damages and in Order 22, rule 1, of the 1891 Rules of Court the defendant is given the right to pay money into court by way of satisfaction with a defence denying liability in any action to recover a debt or damages except in actions of libel or slander or where the defence raises a question of title to land or an incorporeal hereditament, and by rule 2 the payment into court had to be signified in the defence.

Our present Order 22, rule 1, makes no exception of actions for libel or slander or where the defence raises a question of title to land or an incorporeal hereditament, but rule 11 forbids the fact of the lodgment to be inserted in the pleadings or to be communicated to the judge or jury until all questions of liability and the amount of the debt or damages have been decided.

Order 65, rule 1, is a repetition of section 53 of the Irish Judicature Act of 1877, which provides that (with certain exceptions not material hereto) "the "costs of every action, question, and issue tried by a "jury shall follow the event, unless, upon application "made the Judge at the trial or the Court shall for "special cause shown and mentioned in the order "otherwise direct". The English Rules of 1875 and 1883 contain a similar provision but although by section 5 of the English Judicature Act of 1890 the costs of and incident to all proceedings in the Supreme Court are in the discretion of the court or judge and the court or judge has full power to determine by whom and to what extent such costs are to be paid, the section commences with the words "subject to the Supreme Court of Judicature Acts and the Rules "of Court" so that it makes no alteration in respect of costs in an action tried by a jury.

The common law jurisdiction as to costs can be traced to the Statute of Gloucester which was passed in the year 6 Ed. 1. That Statute bound the common law judges so that they could not depart from the rule that was laid down that costs followed the event.

Lord Blackburn said in *Garnett v. Bradley* (1) : " Costs " in Courts of Common Law were not by Common " Law at all, they were entirely and absolutely " creatures of statute. . . . Statutes were passed " at different times giving a Plaintiff a right to " recover costs in any action . . . but all those " statutes went upon one principle throughout. The " result was, that, as a general rule in every case in " Courts of Common Law the party who succeeded " got his costs whether he was Plaintiff or Defendant, " whether he succeeded by a verdict or upon demurrer. " I say the general rule established by all those " numerous statutes (for there was no one statute " which laid it down) was that the successful party " got his ordinary taxed costs ; in other words, that " the costs followed the event and that the party who " was successful had them as a matter of right ".

What then is the *event* which the costs are to follow ? In *Field v. Great Northern Railway Co.* (2), Kelly C.B. said it was the conclusion of the whole matter or proceeding which commenced with the writ of summons and ended with the final judgment, and Mellor J. in the same case said it was the result of the entire litigation. Lord Coleridge C.J. described it as the ultimate event of the trial: *Creen v. Wright* (3).

In *Foster v. Farquhar* (4), Bowen L.J., who delivered the judgment of the Court of Appeal, referring to the proviso in Order 65, rule 1, made some observations which I think apply with peculiar fitness to the present case. He said : " The event which the costs " are in general to follow is not, it will be observed, " the verdict of the jury, but the event of the litigation. " The jury may find a verdict for one party, and never- " theless the judgment in the end may be entered by " the Court for the other. In such a case the costs, " if left to the ordinary course, would follow not the " verdict, but the judgment as in the days before the " Judicature Acts."

(1) (1878) 3 App. Cas. 944, 962.
(2) (1878) 3 Ex. D. 261.
(3) (1877) 2 C.P.D. 354.
(4) [1893] 1 Q.B. 564, 567.

Formerly when the question of the sufficiency of the money lodged in court was raised in the pleadings, it was put explicitly to the jury, but that was no longer possible after the introduction of the rule which provided that no communication of the fact or the amount of the lodgment should be made to the jury. How then was the question to be answered? This was the problem which was considered by the English Court of Appeal in *Williams v. Goose* (1), in an application for a new trial in an action tried by Mathew J. with a jury. The action was for personal injuries occasioned by the defendant's negligence. The defendant in his defence denied liability and paid £30 into court as being sufficient to satisfy the plaintiff's claim, on which defence the plaintiff joined issue.

At the trial the jury, who were not informed of the lodgment, found a verdict for the plaintiff for £15 damages, and judgment was thereupon entered for the defendant. Counsel for the plaintiff argued that Order 22, rule 22, which provided that the fact of payment into court was not to be communicated to the jury, was ultra vires, that litigants had substantive rights, one of which was to have the issues of fact raised in an action left to the jury, and that the power of making rules under the Judicature Act was confined to matters of procedure, and that the rule could not deprive the plaintiff of the right conferred by section 22 of the Judicature Act, 1875, to have the issues for trial by jury submitted and left by the judge to the jury with a proper direction in point of law. The court (Esher M.R., Lopes and Chitty L.JJ.) held that the rule related merely to procedure, and that the issue of sufficiency was to be left to the jury in this way, namely: the jury is to be asked what is the proper amount of damages, and when that amount is ascertained by their verdict it is a mere question of arithmetic what the effect of their verdict is with regard to the issue of sufficiency.

It should be observed that although the plaintiff had succeeded in proving both negligence and damages,

(1) [1897] 1 Q.B. 471.

the court held that judgment was rightly entered for the defendant, because the money paid into court was more than sufficient to satisfy the plaintiff's claim.

Another alteration of the procedure was made in England in 1933 by Order 22, rule 6, and in Northern Ireland in 1943 by Order 22, rule 11, which provided that with a few exceptions not material hereto, there should be no statement in the pleadings of the fact that money had been paid into court. The fact and the amount of the payment were to be disclosed to the plaintiff by a notice, the prescribed form of which is virtually the same as the former plea of payment into court. It contains the same averment, namely, that the sum is enough to satisfy the plaintiff's claim and that the defendant admits or denies liability therefor. Owing to the alterations made by Order 22, the position in all cases (except cases of tender and certain actions for libel) is now to all intents and purposes the same as it was in England before 3 and 4 Wm. IV. c. 42, which was extended by the Common Law Procedure Act, 1852. Before the Act of William IV, a practice existed of paying money into court as amends, but the payment was not entered upon the record by way of plea: see *The Annual Practice*, 1952, Vol. 1, p. 385: *Bullen and Leake*, 3rd Ed., p. 664: *Tattersall v. Parkinson* (1). And in such a case if the lodgment was found to be sufficient, judgment was entered for the defendant with the costs of the suit. That was the invariable practice, and it would be extraordinary if the alteration in the procedure had made any alteration in the established principle that a defendant who had made a sufficient lodgment in court was entitled to judgment and costs. Indeed it might well be asked what more he could have done than pay a sufficient sum into court with admission of liability.

The Lord Chief Justice is of opinion that the result of the change is to abolish the special defence that formerly existed and therefore that the ground for the former practice whereby judgment was given for the defendant has disappeared, and that payment into

(1) (1847) 16 M.&W. 752, 759.

court is no longer to give an alternative ground of defence, but is to remain outside the issues joined between the parties and is not to be taken into account in determining those issues. He says it is to have such weight and effect as may be attached to it in the exercise of the judicial discretion as to costs. He considers that this view is supported by the concluding words of rule 11 which after referring to the exclusion of the fact of the lodgment from the pleadings and directing that no communication about it is to be made to judge or jury ends " But the Judge shall, in exer- " cising his discretion as to costs, take into account " both the fact that money has been paid into Court " and the amount of such payment ". He thinks that " but " is significant, that the matter is no longer to appear in the pleadings, it is no longer a defence, it is to sound in costs as the judge in his discretion may determine.

I do not think that the intention or the effect of the rule is to deprive the defendant of any advantage which he formerly derived by a plea of payment into court in his defence. The notice of the lodgment is couched in the same language as that of the plea, and the object of the rule directing that no communication about the lodgment should be made to the judge or jury was that in assessing damages neither the fact nor the amount of the money paid into court should be taken into account. Probably it was considered that knowledge of the fact of the lodgment, and consequently of the willingness of the defendant to settle the action, or knowledge of the amount lodged in court might improperly influence the decision of those whose bounden duty was to measure the damages according to the evidence.

However that may be, the main issue in every jury case where money was lodged in court with an admission of liability was not the amount of the damages to be given to the plaintiff, but whether the money lodged in court was sufficient to satisfy the plaintiff's claim as measured by the verdict of the jury, and if the lodgment was sufficient, judgment was invariably

given for the defendant, and I think the only exception is in cases in which special cause is shown, for example, where the defendant by improper or unreasonable conduct in matters connected with the institution or conduct of the suit has occasioned unnecessary litigation or expense: Lord Watson in *Huxley v. West London Extension Ry. Co.* (1), cited with approval in *Donald Campbell & Co. v. Pollak* (2).

In my opinion the defendants in the present case are the successful party and as such are entitled to judgment because the amount lodged in court has been found to be sufficient to satisfy the plaintiff's claim, and as that is the ultimate result or the event of the trial they ought not to be deprived of their costs "unless upon application made, the Judge at the "trial or the Court shall for special cause shown and "mentioned in the order otherwise direct".

If the view which I have taken of the "event" is correct, it is clear that there is no ground whatever why the costs should not be given to the successful party because there was no suggestion that there had been any improper or unreasonable conduct of the defendants in the institution or conduct of the proceedings which had embarrassed the plaintiff or caused unnecessary litigation or expense. In paying money into court a defendant generally calculates the risks of the action and in order to avoid costs lodges the minimum sum which he thinks will induce the plaintiff to take it out of court and stop the proceedings. The plaintiff is then confronted with a dilemma—will he accept the amount lodged, take the money out of court and tax his costs to date? Or will he decline to accept the amount and continue the action? The Lord Chief Justice appears to have been greatly influenced by this consideration in the present case. He thinks that the amount awarded under the Fatal Accidents Acts—£1860—is neither ample nor generous, and that the lodgment of £1879 was so small that he could not imagine any responsible solicitor or counsel advising the plaintiff that she was unlikely to get

(1) (1889) 14 App. Cas. 26, 33.

(2) [1927] A.C. 732.

more. He also holds that the plaintiff made a reasonable decision in deciding not to accept the lodgment and on this ground he says he would exercise his discretion in her favour.

There was, of course, no need to exercise his discretion in her favour once he had held that the " event " was the verdict of £1,860 damages, but with regard to the dilemma which confronted the plaintiff in making her decision to accept or refuse the amount lodged in court, that is a difficulty which every plaintiff must meet, if the defendant is advised to make a lodgment, unless the defendant were so ill-advised as to lodge either such a miserably small sum that the plaintiff would have no hesitation in refusing it or such a very generous sum that the plaintiff would have no hesitation in accepting it. But I do not think that the proper and legitimate use of the machinery of justice by the defendant is any ground for giving the plaintiff costs to which she would not otherwise be entitled: *Granville v. Firth* (1). Moreover even if the plaintiff acted reasonably in refusing to accept the lodgment, one must admit that the defendant acted none the less reasonably in making a sufficient and fairly accurate estimate of the damages to which the plaintiff was entitled and in fixing the amount of the lodgment accordingly.

The opinion which I have expressed is confirmed by the decision of the English Court of Appeal in *Findlay v. Railway Executive* (2) where the salient facts bear a remarkable resemblance to those in the present case, and though it was a non jury case, I would be prepared to adopt the language of the relevant parts of the judgments as representing my own opinion in the present case. The defendants admitted negligence but denied personal injuries loss and damage, and lodged £920 in court. The verdict was for £867 5s. 1d.

Somervell L.J. held that the defendants who had paid in more than the plaintiff succeeded in getting, were the successful litigants and, being the successful party, were, according to the settled practice, entitled

(1) (1903) 72 L.J.K.B. 152. (2) [1950] 2 All E.R. 969.

to their costs as from the date of the payment into court. He said that the main purpose of the lodgment was the hope that further litigation would be avoided, the plaintiff being encouraged to take out the sum paid in if it was a reasonable sum. If the plaintiff went on and got a smaller sum he would be penalised wholly or to some extent in costs. Once the money had been paid in the lis between the parties is simply, " Is that " sum sufficient to cover the damage which has been " suffered ? "

Cohen L.J. said that counsel for the plaintiff had been unable to refer to any case where the plaintiff had recovered the costs of the whole action, and he thought the defendant could not be ordered to pay the costs of the action unless there was something in his conduct which justified the plaintiff in proceeding to trial.

Denning L.J. concurred. Referring to a matter which appears to have influenced the mind of the Lord Chief Justice in the present case viz. :—the embarrassing situation of the plaintiff who had to decide whether she would or would not accept the money lodged in court, he said (1) : " The hardship on the " plaintiff . . . . has to be weighed against the dis- " advantages which would ensue if plaintiffs . . . were " allowed to go to trial and run up costs with impunity. " The public good is better secured by allowing " plaintiffs to go on to trial at their own risk generally " as to costs. That is the basis of the rules as to " payment into court, and I think we should implement " them here, even though it means that the plaintiff " has to pay out much of her damages in costs to the " defendants. The only issue in the case was the " amount of damages. The defendants paid a " reasonable sum into court. The plaintiff took her " chance of getting more and, having failed, she must " pay the costs."

In that case there was of course no mention in the defence of the fact or the amount of the payment into court, nor was the sufficiency of the amount an issue raised by the pleadings, yet it was the very fact of the sufficiency of the lodgment in court which was the

(1) Ibid. 972.

determining factor of the case as regards judgment and costs. Whether the trial judge thinks that the damages awarded by the jury were inadequate is, I think, beside the point, because on that matter the court must accept the amount awarded by the jury as being sufficient to satisfy the plaintiff's claim : *Wight v. Shaw* (1).

The Lord Chief Justice referring to another aspect of the case said that there was an irregularity in the notice of payment into court which admitted liability whereas the defence denied it, and while he was not at all clear that the inconsistency had prejudiced the plaintiff, he held that the defendants were not entitled to rely on the payment into court. Counsel for the plaintiff made no reference to this inconsistency, nor does it appear to have been mentioned at the trial. Why ? Because the parties were under no illusion whatever about the real question in the case. The admission of liability in the notice was quite clearly an admission of damage only to the extent of the amount lodged. The notice which is in the ordinary form states that the amount lodged " is enough to satisfy the plaintiff's " claim and admit liability therefor," and the defence denying damage means, and I have no doubt was understood by the plaintiff's advisers to mean, " We " the defendants deny that you have suffered any " damages beyond the amount lodged."

The situation seems to me to be exactly the same as if the denial of damage had been altogether omitted from the Defence, because by Order 21, rule 4, " No " denial or defence shall be necessary as to damages " claimed or their amount ; but they shall be deemed " to be put in issue in all cases unless expressly " admitted," and the notice does expressly admit damage but only to the extent of the amount lodged.

It seems to me that the alleged irregularity is quite imaginary, unless indeed it is not permissible to admit and, at the same time, to limit the liability for damage, a supposition which would abolish the established practice of payment into court.

(1) (1887) 19 Q.B.D. 396.

However that may be, the plaintiff has accepted and drawn out a portion of the total lodged, i.e., £350, being the amount lodged in respect of the claim under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, and never raised any objection to the lodgment or to the form or validity of the notice.

I do not think that the court should be astute or eager to discover an irregularity which was never mentioned during the trial, and in no way prejudiced or embarrassed the plaintiff in the conduct of her case.

I think that the defendants are entitled to judgment with costs of the suit from the date of the service of the notice of the lodgment, and that the plaintiff should have her costs down to that date.

The appeal must be allowed.

BLACK L.J. : The plaintiff in this action is the widow and administratrix of Allan McCormick deceased, whose death took place on January 31, 1951, as a result of a tragic accident which occurred at the defendants' shipyard on that date. The plaintiff's claim in the action was for damages (a) under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, on behalf of the estate of the deceased, and (b) under the Fatal Accidents Acts, 1846–1908, on behalf of herself and the other dependants of the deceased for loss and damage sustained by reason of alleged negligence and breach of statutory duty on the part of the defendants. The defendants by their defence delivered on June 25, 1951, admitted they were guilty of negligence, but denied that they were guilty of any breach of statutory duty. They also denied that the plaintiff or any of the persons on whose behalf the action was brought were dependent upon the deceased or had suffered any loss or damage. On the same date the defendants paid into court £350 to satisfy the plaintiff's claim under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, and £1879 : 18 : 0 to satisfy the plaintiff's claim under the Fatal Accidents Acts, 1846–1908, and in their notice to the plaintiff of these payments into

court they expressly stated that they admitted liability for these claims. The plaintiff accepted the £350 paid in to meet the claim under the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, but proceeded to trial on the claim under the Fatal Accidents Acts. The trial took place before the Lord Chief Justice and a special jury. The real issue between the parties was merely the question of the amount which should be awarded as damages under the Fatal Accidents Acts, and the only questions which were left to the jury were as to the assessment of damages under those Acts, and their apportionment among the dependants of the deceased. In the result the jury assessed the damages at the sum of £1860 and apportioned this sum between the plaintiff and the other dependants of the deceased. On this verdict the Lord Chief Justice ordered that judgment be entered for the plaintiff for £1860 with costs of the suit to be taxed without regard to the fact of the lodgment in court by the defendants of the sum of £1,879 : 18 : 0 in respect of the claim under the Fatal Accidents Acts, a sum in excess of the amount awarded by the jury on foot of that claim.

From this order, as far as it deals with costs, the defendants have appealed, contending that in lieu of the defendants being ordered to pay all the plaintiff's costs of the action the plaintiff ought instead to have been ordered to pay the defendants' costs, at any rate from the date of the lodgment in court by them of the £1879 : 18 : 0.

In England under the legislation and rules now in force the costs of and incidental to all proceedings in the Supreme Court are entrusted to the discretion of the court or judge: Supreme Court of Judicature (Consolidation) Act, 1925, s. 50, R.S.C., O. 65, r. 17. This applies both to actions tried by a jury and to actions tried by a judge without a jury. In Northern Ireland, however, the position is different in regard to actions tried by a jury. The costs of such actions are controlled by a proviso contained in section 53 of the Supreme Court of Judicature (Ireland) Act, 1877.

That section indeed first enacts that subject to the provisions of the Act and Rules of Court the costs of and incident to every proceeding in the High Court of Justice and Court of Appeal respectively shall be in the discretion of the court. But the section then goes on to subject the generality of this enactment to the proviso that the costs of every action question and issue tried by a jury shall follow the event, unless, upon application made, the judge at the trial of the court shall for special cause shown and mentioned in the order otherwise direct. It appears to me that the question raised in the present appeal must turn primarily upon the application of this proviso to cases in which money has been paid into court by a defendin accordance with the present practice under Order 22 of our Rules of Court.

For a period of over fifty years after the coming into operation of the Judicature Acts the English Rules of Court contained a provision in regard to actions and matters tried with a jury similar to the proviso contained in section 53 of the Irish Act of 1877. The wording of the English Rules from time to time in force differed slightly from the proviso in section 53. In its latest form the English Rule (O. 65, r. 1) provided that where any action cause matter or issue is tried with a jury the costs shall follow the event unless the judge by whom such action cause matter or issue is tried, or the court, shall for good cause otherwise direct. Under this rule the judge or court might otherwise order for "good cause". Under the Irish section the judge or court can only otherwise order for "special cause," and the special cause must be shown and mentioned in the order.

The purpose of these provisos in regard to the costs of matters tried by a jury is expounded in the speech of Lord Finlay L.C. in *Reid, Hewitt and Company v. Joseph* (1). After recalling that before the Judicature Acts the costs at common law followed the event in this sense, that while the party who had on the whole succeeded in the action got the general costs of the action and of any issue on which he succeeded, the

(1) [1918] A.C. 717, 724.

costs of any issue on which the other party had succeeded were recovered by him. Lord Finlay proceeds to quote Order 55 of 1875 which was similar in its wording to the later Order 65, rule 1, and then continues: "The great change made by Order 55 of 1875 "was that the costs were put in the discretion of the "Court, but an exception was made in the case of trial "by jury, as it was provided at the end of the order "that where any action or issue is tried with a jury "the costs should follow the event, unless the judge "or Court should for good cause otherwise order. This "proviso was obviously introduced for the purpose of "preserving in jury cases the old practice as to costs. "It was no doubt apprehended that if the discretion "of the judge as to costs applied to such cases the "result might be that a judge who had taken a strong "view against the party in whose favour the jury "found might exercise his discretion as to costs in such "a way as to deprive the successful party to a great "extent of the fruits of victory, or possibly throw "costs upon him." By an amendment, however, made in 1929 this proviso regarding the costs of actions and matters tried by a jury was deleted from the English Order 65, rule 1, so that in England the costs both of non-jury actions and of jury actions are now in the discretion of the judge. But in Northern Ireland the judge's discretion is still fettered in actions tried by a jury by the proviso in section 53 of the Act of 1877. While the position has now been so radically altered in England yet the decisions of the English courts prior to the amendment of 1929 are of course of great assistance in regard to the interpretation and application of the statutory provision still in force in Northern Ireland.

By a long series of decisions dating from very shortly after the coming into force of the Judicature Acts it has been established that the word "event" in these provisions regarding the costs of actions tried by a jury may in the phrase use by Bramwell L.J. in *Myers v. Defries* (1) be read as a nomen collectivum, or as was

(1) (1880) 5 Ex. D. 180, 185.

said by Thesiger, L.J. in the same case (1) may be read distributively. The "event" of an action may be complex: some issues may be decided by the jury in favour of the plaintiff and some in favour of the defendant. The effect of the rule in such cases is held to be not that the party succeeding in the action as a whole is to be entitled to the whole of his costs of the action, but that the plaintiff is entitled to the costs of any separate issue found in his favour by the jury, and that the defendant is entitled to the costs of any separate issues found in his favour. This principle was applied in cases in which money had been paid into court by the defendant in satisfaction of the plaintiff's claim. One of the questions which arose in such cases was whether the amount paid into court was sufficient. This was not an "issue" within the meaning of that term in section 53 of the Act of 1877. The word "issue" in that section does not refer to the questions or issues submitted to the jury at the trial but to an issue set down to be formally tried, such as an interpleader issue: *Davies v. Edinburgh Life Assurance Co.* (2) per Phillimore L.J.; *Reid, Hewitt and Company v. Joseph* (3) per Finlay L.C. But although not an issue in this sense, the sufficiency of the amount paid into court was always regarded as a question the costs of which under section 53 of the Irish Act and the corresponding English rule would normally follow the event of the decision of that question. If, as a result of the jury's determination the plaintiff recovered a smaller sum by way of damages than the sum which the defendant had paid into court the defendant would under the statute or the rule be entitled to the costs of ascertaining the amount of damages. Before the Judicature Acts money could not be paid into court with a denial of liability. If a defendant lodged money in court in satisfaction of the plaintiff's claim the only question for the jury was whether the sum lodged was sufficient. As a result, however, of the Judicature Acts and Orders it became allowable for the defendant to lodge money in court while denying liability in his

(1) Ibid. 188.
(2) [1916] 2 K.B. 852, 857.
(3) [1918] A.C. 717, 722.

defence : *Berdan v. Greenwood* (1). Where a defendant took this course the courts, reading the proviso in section 53 of the Irish Act of 1877 and in the corresponding English rule distributively, held that for the purpose of applying the proviso there were two distinct questions raised, namely (*a*) whether the defendant was under any liability to the plaintiff, and (*b*) whether the sum paid into court by the defendant was sufficient to cover the liability, if any. If the plaintiff succeeded on the first of these questions, but recovered less than the amount paid into court, he was entitled to the whole of his costs of the action down to the time of the payment into court, and also to his subsequent costs relating to the issue of liability, whereas the defendant was held entitled to his general costs of the action incurred subsequent to the payment into court. This became the established rule of practice in such cases of the courts both in Ireland and in England founded on their interpretation of the proviso in section 53, and the proviso in the corresponding English rule. In England, however, it was felt, with experience, that the rule was too favourable to plaintiffs and was apt to work what was considered injustice. Where a plaintiff had declined to accept the sum lodged in court by the defendant and had continued with the action, but had ultimately been adjudged by the jury not to be entitled to recover any more than the amount of the lodgment why, it was asked, should the defendant in such a case be ordered to pay the plaintiff's costs of fighting the issue of liability ? Accordingly in 1913 the English rules in regard to payment into court were amended so as to provide that a plaintiff who did not accept money paid into court with a denial of liability, but proceeded to trial, and did not recover more than the sum paid into court, should not be allowed his costs of the issues as to liability unless the judge was satisfied that there were reasonable grounds for not accepting the sum paid in. So the English rules remained until 1929 when the proviso that where an action issue cause or matter is tried by a

(1) (1876) 3 Ex. D. 251.

jury the costs shall follow the event was deleted from the English Order 65, rule 1, and since 1929 the costs of actions tried by a jury, like the costs of non-jury actions, are left to the discretion of the judge. No such changes as these, however, were made in the practice in our courts where the matter is governed not merely by rule but by Statute, and the proviso to section 53 of the Act of 1877 remains unrepealed.

Not only have the English rules as to costs been altered from time to time, but the rules as regards payment into court itself have also been more than once altered, both in England and in Ireland. The situation created by such a payment depends entirely on the rules of court in force for the time being, and strangely enough eminent legal authorities have failed to agree as regards the proper description of the situation. Is or was a payment into court a defence to the plaintiff's claim? In 1884 Brett, M.R. and Bowen L.J. were clearly of opinion that payment into court was to be regarded as a defence to the action: *Wheeler v. The United Telephone Company* (1): *Goutard v. Carr* (2). In *Penny v. Wimbledon Urban Council* (3) however, Vaughan Williams L.J. said that in a case of payment into court with a denial of liability the defence is the denial of liability and not the payment into court, which is not set up as a defence but as an offer of amends made for the sake of peace. And in the more recent case of *Cumper v. Pothecary* (4) Goddard L.J. delivering the judgment of the English Court of Appeal stated that payment into court is not and never was a defence. Perhaps some explanation of these apparent inconsistencies may be found by looking at the differences which have taken place in the wording of the relevant rules. In Order 30, rule 1 of the rules contained in the First Schedule to the English Judicature Act of 1875 it is directed that payment into court shall be pleaded in the defence, and the same form of words is used in rule 30 of the rules in the Schedule to the Irish

(1) (1884) 13 Q.B.D. 597, 613.
(2) Ibid. 599, 601.
(3) [1899] 2 Q.B. 72, 77.
(4) [1941] 2 K.B. 58, 66.

Act of 1877. Under such a rule it would be natural to regard payment into court as a matter of defence. And if the plaintiff failed to recover a greater sum than the amount in court the practice established by *Goutard v. Carr* (1) and *Wheeler v. The United Telephone Company* (2) was that judgment in the action should be entered for the defendant. The rule that payment into court should be pleaded in the defence was subsequently altered to read that payment into court should be *signified* in the defence. One might have thought that this would have effected a difference now that the defence was no longer to contain a plea of the payment into court but merely a notification of such payment. Nevertheless the practice continued of entering judgment for the defendant if the plaintiff did not obtain a verdict for more than the amount in court. Indeed *Wheeler v. The United Telephone Company* (2) was, I believe, decided after the alteration of the rule: the alteration was, I think, made in England in 1883. That this was the practice in England may be seen by referring to such reported authorities as *Wagstaffe v. Bentley* (3); *Hubback v. British North Borneo Co.* (4); and *Powell v. Vickers Sons & Maxim Limited* (5). That it was the practice in our courts is familiar to every practitioner.

In 1933, however, an alteration was made in the English rules. By a new Order 22, rule 6, made in that year it was directed that except in an action to which a defence of tender before action is pleaded, or in which a plea under the Libel Acts, 1843 and 1845 has been filed, no statement of the fact that money has been paid into court under the preceding rules of the order shall be inserted in the pleadings, and that no communication of that fact shall at the trial of any action be made to the judge or jury until all questions of liability and amount of debt or damages have been decided but that the judge shall, in exercising his discretion as to costs, take into account both the fact that money

(1) (1884) 13 Q.B.D. 599.
(2) (1884) 13 Q.B.D. 597.
(3) [1902] 1 K.B. 124.
(4) [1904] 2 K.B. 473.
(5) [1907] 1 K.B. 71.

had been paid into court and the amount of such payment.

The new Northern Ireland rules of 1936 only partially followed the alterations made in England in 1933. They omitted the direction in the previous rules that the payment into court should be signified in the defence, but they did not contain any provisions expressly forbidding the statement of that fact in the pleadings. They followed the rules of 1905 by directing that where a cause or matter is tried by a judge with a jury no communication should be made to the jury either of the fact that money had been paid into court or of the amount paid in. But they did not forbid disclosure of these matters to the judge. In 1943, however, the Northern Ireland rules were amended, and the Northern Ireland Order 22, rule 11 enacted in that year is in precisely the same terms as the present English Order 22, rule 6.

The difficulty in the present case is as to the effect of the proviso in section 53 of the Act of 1877 in the light of the altered rules as to payment into court. Now that no reference to the payment into court appears in the pleadings, is the question of the sufficiency of the payment still to be regarded as a question tried by the jury, the costs of which according to the proviso in section 53 are to follow the event? I confess that I have found the matter one of considerable difficulty. Unfortunately we cannot derive assistance on the precise point from English decisions inasmuch as the problem does not arise in England, where the rule corresponding to the proviso in section 53 had been abrogated in 1929. Undoubtedly the new rules effected a considerable change in practice in cases where the defendant had made a payment into court. An authorative discussion of the nature of the change will be found in the speech of Lord Wright in *Bonitto v. Fuerst Bros. & Co. Ltd.* (1). No reference to the payment into court now appears on the record, and whatever may have been the position before the new rules the position now is that payment into court (except in cases of tender and with pleas under the

(1) [1944] A.C. 75, 89.

Libel Acts, 1843 and 1845) is not now a defence to the action. The judge and the jury have to try the action on the record, that is, on the pleadings, and apparently in giving judgment the judge must have regard solely to the issues contained in the pleadings, and must not take any account of the payment into court until he comes to deal with the question of costs. Accordingly, in a case where a plaintiff recovers a smaller sum than the amount paid into court by the defendant, it would appear that judgment ought not now to be entered for the defendant as under the former practice, but should be entered for the plaintiff for the amount found in his favour, subject of course to any order which may be made in regard to costs. That this is now the practice of the English courts I gather, not only from what was said in *Bonitto's* case (1), but also from the directions as to judgment appearing in the reports of modern English cases, e.g., *English v. Bloom* (2); *Brown v. New Empress Saloons Ltd.* (3); *Gray v. Jones* (4). In each of these cases judgment was given for a plaintiff for the amount found in his favour, though he had failed to recover more than the amount lodged in court by the defendants.

The plaintiff's contention on the present appeal is that when the proviso in section 53 of the Act of 1877 provides that the costs of every action question and issue tried by a jury are to follow the event the questions to which the proviso refers must be questions arising on the pleadings in the action. And reliance is naturally placed upon the features of the present practice to which I have already referred, that the question of the sufficiency of the payment into court is not raised in the pleadings, that the jury give their verdict without any reference to and without knowledge of the payment into court, and that the judge directs judgment to be entered in accordance with the verdict of the jury, also without any reference to and without knowledge of the payment.

(1) [1944] A.C. 75.
(2) [1936] W.N. 262.
(3) (1937) 106 L.J.K.B. 331.
(4) (1939) 160 L.T. 361.

Undoubtedly this is ex facie a very plausible contention. But in my opinion it gives too narrow a meaning to the phrase "question tried by a jury" in the proviso to section 53. I think that this phrase "question tried by a jury" as used in section 53 should not be construed in this narrow sense contended for by the plaintiff, but should be given its wide natural meaning as any question which was in fact tried by the jury whether it appears as an issue on the pleadings or not. In the present case the defendants expressly admitted in their defence that they were guilty of the negligence alleged in the statement of claim, and they did not deny that it was by reason of that negligence that the plaintiff's husband sustained the injuries from which he died. No doubt the defence denied that the plaintiff, or any of the persons on whose behalf the action was brought, were dependant upon the deceased, or that they had suffered loss and damage. But to my mind it is an overrefinement to split up this pleading into two separate questions (a) were the plaintiff and her children dependent upon the deceased, and (b) what was the amount of their loss. One cannot treat the fact of dependency as a separate issue from the quantum of dependency. If the quantum is nil there is no dependency; if the quantum is positive there is clearly dependency. In truth the one issue raised by the defence was what amount (if any) should the plaintiff and her children recover. And when the defendants paid the money into court and the plaintiff did not accept it within the time prescribed by the rules the question at once arose whether the amount paid into court was sufficient. If the plaintiff had seen fit to accept the sum paid into court there would no longer have been any issue between the parties, and there would have been no question for a jury to try. In my view in a case such as the present one the jury under the present practice in fact try the question of the sufficiency of the amount paid into court every bit as much as they tried it under the practice which obtained before the alterations of the rules in 1936 and 1943, when it was always accepted that for the purpose of applying the proviso to section

53 and the corresponding provision in the English Order 65, the sufficiency of the amount in court was in fact a question tried by the jury, although in form for many years past the jury were simply asked to determine the amount of damages to which the plaintiff was entitled, without being allowed to know that any sum had been paid into court.

Although as I have mentioned, the precise question as to the effect of the proviso to section 53, or of a rule in similar terms, cannot now arise in England, I think the view which I have expressed is in accordance with the view taken by the English Court of Appeal. In *Findlay v. Railway Executive* (1), the plaintiff claimed damages for personal injuries. The defendants by their defence (in terms not dissimilar from the defence in the present case) admitted that they were negligent but did not admit that the plaintiff had suffered personal injuries damages or pecuniary loss. This pleading Somervell L.J. construed as indicating that the only issue left was the quantum of damages based on the extent of the personal injuries which the plaintiff could prove if the matter went to trial. The defendants paid £920 into court under the rules. The action was tried by a judge sitting without a jury. He awarded as damages £867 : 5 : 1, but gave the plaintiff the costs of the action. The defendants appealed against this order to the Court of Appeal. The leading judgment was delivered by Somervell L.J., who quotes (2) a passage from the judgment of Lord Sterndale M.R. in *Ritter v. Godfrey* (3), in which it was stated that there is a settled practice of the courts that in the absence of special circumstances a successful litigant should receive his costs and a passage (4) from the speech of Viscount Cave L.C. in *Campbell (Donald) & Co. v. Pollak* (5) to the effect that a successful defendant in a non-jury case has in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the

(1) [1950] 2 All E.R. 969.
(2) Ibid. 970.
(3) [1920] 2 K.B. 47.
(4) [1950] 2 All E.R. 971.
(5) [1927] A.C. 732.

plaintiff. Somervell L.J. then proceeds: "The first "point to be decided here is whether a defendant who "has paid money into court which has not been taken "out and exceeds the sum awarded to the plaintiff is a "successful litigant or a successful party within those "two statements of the law. I hold that he is, and that "the principles there laid down apply. The main pur- "pose of the rules for payment into court is the hope "that further litigation will be avoided, the plaintiff "being encouraged to take out the sum paid in, if it "be a reasonable sum, whereas if he goes on and gets "a smaller sum, he will be penalised wholly or to some "extent in costs. Once therefore the money has been "paid in, the *lis* between the parties simply is: Is that "sum sufficient to cover the damage which has been "suffered. *Prima facie*, therefore, the defendants in "the present case are entitled to be paid their costs "as from the date of the payment in". And from his observations in *Monk v. Redwing Aircraft Co. Ltd.* (1), I think it is legitimate to infer that the same view would have commended itself to Lord Greene M.R.

I think it right to mention some other considerations which appear to me to reinforce the conclusion which I have arrived at. The sum of the effect of the alterations in our rules in 1936 and 1943 was (a) to provide that instead of being signified in the defence the payment into court should be signified in a notice served by the defendant on the plaintiff and (b) to forbid communication to the trial judge of the fact of the payment into court until all questions of liability and damages have been decided. The prescribed form of notice of payment into court (R.S.C. Appendix B. No.4) follows closely the form in which payment into court was previously signified in the defence. It would seem strange that such a slight change, the fact that the payment into court is to be signified in a notice instead of in the defence, should work such a revolutionary change in the practice regarding liability for costs as is contended for by the plaintiff. For if the plaintiff's contention is correct the change will be indeed a revolutionary one. However small the

(1) [1942] 1 K.B. 182, 187.

amount a plaintiff succeeds in recovering he will, under the terms of the proviso to section 53, be entitled to the whole of the costs of the action if the case is tried by a jury " unless upon application made, the " Judge at the trial or the Court shall for special cause " shown and mentioned in the order otherwise direct ", notwithstanding that the defendant may have paid into court a sum greater than that awarded by the jury. So instead of the old long established practice under which a defendant in such circumstances has always been held entitled against the plaintiff to his costs on the issue of amount from the time of the payment into court, he will (if the plaintiff's contention is correct) now have actually to pay the plaintiff's costs in the absence of a special order from the trial judge or the court. I think that the court should be slow to attribute such effect to the alterations of the rules in 1936 and 1943 as would produce such an extraordinary result. It is not a strong answer to say that the defendant can always avoid the injustice by applying for a special order. As Bramwell L.J. observes in *Myers v. Defries* (1), " it is bad legislation to lay down " an unreasonable rule and then to give power to " amend it" . Or as Lord Finlay L.C. says in regard to a similar contention in *Reid, Hewitt and Company v. Joseph* (2), " Such an alteration would, moreover, " in its working have been inequitable, and it cannot " be supposed that, without any reason for it, an " innovation of this kind was contemplated by those " who framed it or the Legislature which sanctioned " the order. It is not to the purpose to argue that " the injustice which would arise under the order so " construed might be corrected by the exercise of " the special power to order otherwise for good cause " conferred upon the judge of [sic] the Court ". Moreover, the injustice is seen to be intensified by the fact that it a defendant in such circumstances applied for a special order and the judge refused it, the defendant would be without remedy ; for if the judge holds that there is no special cause and makes no order the Court

(1) (1880) 5 Ex. D. 180, 185. (2) [1918] A.C. 717, 725.

of Appeal cannot interfere: *Moore v. Gill* (1).

Another consideration which I think lends support to my view is this. The proviso to section 53 of the Act of 1877 is a statutory provision. It was enacted by the Legislature for the purpose explained in the passage which I have quoted from the speech of Lord Finlay L.C. in *Reid, Hewitt and Company v. Joseph* (2). Until the recent alterations in the rules the sufficiency of a payment into court was admittedly a question tried by the jury. Can the rule-making authority withdraw questions or issues decided by the jury from the control of the proviso to section 53 by simply enacting that they are no longer to be raised in the formal pleadings but in separate notices served by the parties? If this can validly be done in regard to payments into court can it also be done in regard to other matters? Could, for example, the operation of section 53 in respect of a defence of the Statutes of Limitations be avoided by prescribing in the rules that such a defence should not be raised in the pleadings but might be notified in a separate notice served dehors the pleadings? I think this consideration may have special weight in regard to an action under Lord Campbell's Act inasmuch as section 2 of the Fatal Accidents Act, 1864, empowers defendants in an action under the Fatal Accidents Acts to pay into court a lump sum as compensation to all persons entitled and clearly contemplates that the sufficiency of the sum paid in shall be submitted as an issue to the jury.

I am accordingly of opinion that under the proviso to section 53 the defendants were prima facie entitled in the present case to their costs relating to the question of quantum of damages. The section, however, entitles the judge to direct otherwise "for special "cause." "Special cause" seems to me a somewhat more stringent requirement than "good cause," the phrase which was used in the English Order 65, rule 1. Instances of circumstances which have been held to constitute or not to constitute good cause will be found conveniently collected in the Annual Practice

(1) (1888) 4 T.L.R. 738. (2) [1918] A.C. 717, 725.

for 1929 at pp. 1320-1321, and the meaning of "special "cause" is discussed in *Wilson v. McMains* (1). In dealing with the matter the judge must accept the correctness of the verdict of the jury: *Harnett v. Vise* (2); *Wight v. Shaw* (3). However much one is bound to sympathise with the plaintiff I cannot see any circumstances in the present case which would constitute "special cause." There is no suggestion of any misconduct on the part of the defendants in regard to the litigation and so far as I can see there are no special circumstances in connection with the case which might not exist in any Lord Campbell's Act case or indeed in any action for negligence. Even in a case tried by a judge without a jury where the costs are in the judge's discretion and he is not fettered by a provision such as that in the proviso to section 53 the course which ought to be taken in the absence of special circumstances where the plaintiff had failed to recover more that the amount paid into court by the defendant has quite recently been reiterated by the English Court of Appeal in the case of *Findlay v. Railway Executive* (4) to which I have already referred. The possibility of an order being made directing the defendants in such a case to pay the plaintiff's costs subsequent to the payment into court would greatly discount the value of the provisions of Order 22. On the question of hardship I would respectfully adopt the observations of Denning L.J. in *Findlay's* case (5) to which Porter L.J. has referred. The present action, however, was tried by a jury. In my view the jury tried the question of the sufficiency of the amount paid into court which, to use Somervell L.J's phrase, was the *lis* between the parties. I think the costs of the trial of this question are controlled by the proviso to section 53, and I am unable to find the existence of any special cause which would justify the making of an order that the costs of the trial of that question should not follow the event. I am, therefore, of opinion that on the jury's verdict,

(1) (1886) 20 L.R. Ir 582.
(2) (1880) 5 Ex. D. 307.
(3) (1887) 19 Q.B.D. 396.
(4) [1950] 2 All E.R. 969.
(5) [1950] 2 All E.R. 969, 972.

the plaintiff ought to have been allowed as against the defendants her costs up to the notice of the payment into court and that the defendants should have been allowed as against the plaintiff their costs of the action subsequent to the payment into court, the one set of costs being set against the other and judgment entered for the balance for the party in whose favour the balance should be found.

SHEIL J.: For the reasons stated by my Lords I agree with them that the order of the Lord Chief Justice should be set aside. I respectfully agree with Lord Justice Porter that judgment should have been entered, and should now be entered, for the defendants. As was pointed out by Bowen L.J. in *Forster v. Farquhar* (1) it is not necessarily the case that judgment should follow the verdict of the jury. Judgment should be for the successful party, and on the issues involved in this trial the successful party were the defendants.

Appeal allowed. Judgment entered for the appellants (the defendants in the action) with costs of the suit from the date of the service of notice of lodgment, the respondent (the plaintiff in the action) to have her costs down to that date.

Solicitors for the appellants: *C. & H. Jefferson.*

Solicitors for the respondent: *N. & F. Tughan & Walmsley.*

J.P.

(1) [1893] 1 Q.B. 564.

MINISTER OF AGRICULTURE v. MACKLE (1).

Emergency legislation—Agriculture—Importation of cattle—Cattle delivered to Ministry of Agriculture—Power to seize Crown property—Crown not bound by Statute—Invalidity of forfeiture order—Agriculture (Miscellaneous War Provisions) Act, 1940 (3 & 4 Geo. 6, c. 14)—Livestock (Import from Eire and Isle of Man) Regulations, 1945 (S.R. & O., 1945, No. 942), reg. 5.

The Livestock (Import from Eire and the Isle of Man) Regulations, 1945, made under section 28 of the Agriculture (Miscellaneous War Provisions) Act, 1940, provide for the seizure of cattle which are suspected by an authorised officer of having been illegally imported, and for the bringing of condemnation proceedings at petty sessions in respect of cattle so seized.

An authorised officer of the Ministry of Agriculture purported to seize cattle which had been purchased by the Ministry under a scheme for the purchase of fat livestock and which had been delivered to the Ministry's grading officer at a grading centre. The seller of the cattle having given notice that the cattle were his property and that they were not illegally imported, the Minister applied to petty sessions for a forfeiture order.

Held, that the Agriculture (Miscellaneous War Provisions) Act, 1940 does not bind the Crown so as to authorise the seizure of Crown property; and as it had been found that the property in the cattle had passed to the Ministry, there was no valid seizure, and accordingly no jurisdiction to make an order of forfeiture.

CASE STATED by the Resident Magistrate sitting at Moy Petty Sessions.

On September 7, 1951, seven bullocks were presented to a grading officer of the Ministry of Agriculture at the Ministry's grading centre at Moy, County Tyrone. Each bullock was marked and numbered by the grading officer, thereby intimating that the animals had been purchased by the Ministry as agents for the Ministry of Food under the scheme for the purchase of fat livestock in Northern Ireland. Later these bullocks were seen at the grading centre by an authorised officer who purported to seize them under the Livestock (Import from Eire and the Isle of Man)

(1) In the Queen's Bench Division before Lord MacDermott C.J. and Curran J.; January 15, 1953.

Regulations, 1945. The officer prepared and displayed a seizure notice in respect of the animals, whereupon the appellant by notice in writing duly claimed that the animals were, at the time of the alleged seizure his property and that they were not imported or brought into the United Kingdom from Eire or the Isle of Man in contravention of the said regulations.

At the hearing of the proceedings for forfeiture at petty sessions the resident magistrate found as a fact that the property in the cattle had passed to the Ministry, but he nevertheless made an order for forfeiture of the proceeds of sale of the cattle on the ground that the defendant had failed to prove that at the time of seizure the animals were his property. The question raised by the case stated was whether the resident magistrate was right in so holding.

Stewart Q.C. and *McDevitt* for the appellant.

Nicholson Q.C. and *MacDermott* for the Minister.

LORD MACDERMOTT C.J.: The question which is raised by this case for the opinion of the court may be shortly stated. The complainant, the Minister of Agriculture, sought a condemnation order in respect of seven bullocks which had been seized by an authorised officer on September 7, 1951, at Moy in County Tyrone pursuant to regulation 5 (1) of the Livestock (Import from Eire and the Isle of Man) Regulations 1945 (S.R. & O. 942 of 1945), made under section 28 of the Agriculture (Miscellaneous War Provisions) Act 1940. Notice of seizure having been duly posted at the local police barracks, the defendant claimed that the cattle were his property and that they had not been imported in contravention of the regulations. On the case coming on for hearing it transpired, as the learned resident magistrate has found, that the seizure had been made at a time when the property in the cattle had passed to the Ministry of Agriculture, the Ministry's Grading Officer having purchased them under the scheme for the purchase of fat livestock in Northern Ireland. That having transpired in the course of the

hearing, the defendant made the point that there was no valid or effective seizure and, accordingly, that the proceedings against him were misconceived and the order for condemnation bad. That takes me to the terms of the regulations which provide, among other things, for restrictions on the import of livestock.

Regulation 5 (1) says that "If any livestock shall "have been imported or brought into the United "Kingdom from Eire or the Isle of Man or otherwise "dealt with in contravention of these Regulations "that livestock shall be forfeited."

Regulation 5 (2) goes on to provide that—"If an "authorised officer has reason to suspect that any "livestock has been imported or brought into the "United Kingdom or otherwise dealt with in contravention of these Regulations he may, subject "to any directions which may be given to him by the "appropriate Minister, seize that livestock and may "sell it at any time after the seizure whether an order "condemning the livestock shall have been made "pursuant to this Regulation at the time of sale or "not."

Regulation 5 (3) provides for the display of a seizure notice and regulation 5 (4) says that "Every animal "so seized or the proceeds of sale thereof as the case "may be shall be forfeited unless within 21 days "after the day on which a seizure notice is first displayed a person (hereinafter called 'the claimant') "gives notice in writing to an authorised officer at the "port of landing or police barracks named in the "seizure notice, that he claims that—

"(i) the animal was at the time of seizure his property, "and

"(ii) the animal was not imported or brought into the "United Kingdom from Eire or the Isle of Man "or that it was not so imported or brought in "or dealt with in contravention of these Regulations,

" whereupon the appropriate Minister shall, as soon as " practicable apply to the Court of Summary Juris- " diction within whose jurisdiction the place at which " the animal was seized is situate for an Order that " the animal or the proceeds of sale thereof, as the " case may be, be forfeited. . . ."

Then follows a proviso that if the claim is admitted by the Minister or no order for forfeiture is made, the animals or the proceed of sale thereof shall be returned to the claimant.

Regulation 5 (5) goes on to provide that—" Upon " such an application "—that is an application for a forfeiture order—" being made the Court shall make " a forfeiture Order, unless the claimant proves to the " satisfaction of the Court that the animal was at the " time of seizure his property and that it was not " imported or brought into the United Kingdom from " Eire or the Isle of Man or was not so imported or " brought in or dealt with in contravention of these " Regulations, and the claimant shall not be entitled " to raise any other defence or objection to the making " of the Order."

These last words were held by the Court of Appeal to be ultra vires in *Minister of Agriculture for Northern Ireland v. McCartney* (1). The view was also expressed in that case that the whole subregulation is coloured by that invalidity, and is therefore ultra vires.

It seems to me that the jurisdiction of the court of summary jurisdiction in proceedings of the kind now in question depends upon a number of facts being established. Firstly, it depends upon there having been an act of seizure within the meaning of regulation 5 (2); then upon the fact of notice of seizure being advertised as provided in subregulation (3); and finally upon a claim having been made as provided in subregulation (4). Where those facts have happened then a jurisdiction arises if the Minister makes an application as directed by subregulation (4).

(1) [1948] N.I. 1.

Now, that being the position it becomes material in this case to enquire as to the fulfilment of one of these conditions precedent, namely, the seizure by an authorised officer within the meaning of sub-regulation (2) of the cattle in question.

The defendant takes the point that there was no lawful seizure, maintaining that the Act of 1940 does not bind the Crown or authorise the seizure of Crown property. The question therefore arises whether there is anything in this statute to show an intention to bind the Crown. It was argued on behalf of the Minister that the provisions of this measure arose out of a matter of war time concern connected with the difficulties of a land border and that it is necessary to have regard to the evil towards which the regulations were directed in order to arrive at the intention of the statute. I am not satisfied with this argument. I have to look at the Act itself, and on doing so I see no reason to think that it was ever intended to authorise the seizure of Crown property, or to give courts of petty sessions jurisdiction to make an order in respect of such property. I have, accordingly, come to the conclusion that the Crown is not bound by the Act of 1940; it seems to me to follow that there was no valid seizure within the meaning of regulation 5 and that, in consequence, the court had not jurisdiction to make the order it purported to make in these proceedings.

No doubt this particular case came to the court because the defendant said that he was the owner of the cattle when he made his claim, and it may be that it does not lie in his mouth to say one thing to bring the matter into court and quite the opposite, as a matter of defence, when he has got there. But however that may be, this is a question of jurisdiction. It was properly admitted by counsel for the Minister that in order to found the jurisdiction a number of things have to be proved, and there seems to be nothing to preclude the defendant from taking advantage of the complainant's failure to do this.

For these reasons I think the question in the case stated should be answered in the negative.

CURRAN J.: I agree with the reasons given by the Lord Chief Justice and with the conclusion at which he has arrived. I must say that I would have some difficulty, if the statute and the regulations did apply to the Crown, in appreciating what is meant by forfeiture. I just mention that as it seems to me to strengthen the contentions which we have accepted.

Appeal allowed.

Solicitor for the appellant: *J. G. Lennon.*

Solicitor for the Minister: *Chief Crown Solicitor.*

S.M.M.

DIAMOND v. MULLAN, ULSTER TRANSPORT AUTHORITY AND ANOTHER (1).

Practice—Writ—Enlargement of time for renewal—Public Authorities Protection Act, 1893 (56 & 57 *Vict.*, *c.* 61).

An application under Order 64, rule 7 for enlargement of the time in which to apply for the renewal of a writ under Order 8, rule 1 was refused on the ground that it would deprive one of the defendants, a public authority, of its statutory defence under the Public Authorities Protection Act, 1893.

APPLICATION under Or. 64, r. 7 for enlargement of time.

On October 26, 1949, the plaintiff was a passenger in a car driven by John Bernard Mullan, the first defendant, when the car was involved in an accident with a lorry owned by the Ulster Transport Authority, the second defendant, and driven by a servant of the Authority. At the time of the accident the lorry was on hire to Holmes, Mullin & Dunn, Ltd., the third defendant.

The plaintiff issued a writ against all three defendants on April, 25, 1950, and on the same day a writ was issued by the first defendant against the second defendant, the Authority. This latter claim was settled by the Authority's insurers, and the plaintiff in the present case assuming that his action would also be settled took no steps to serve his writ until March 4, 1952, by which date it had ceased to be in force. The plaintiff now applied for an enlargement of the time for making application to renew the writ.

Stewart Q.C. and *Breen* for the plaintiff.

Lowry for the Ulster Transport Authority.

Kelly for the defendant Mullan.

(1) In the Queen's Bench Division before Lord MacDermott C.J.; December, 12, 1952.

LORD MACDERMOTT C.J.: This is an interesting application. It is technical in a certain sense, but covers a very important point in connection with the procedure of this court. The plaintiff, Mr. Diamond was injured when a car in which he was a passenger and which was being driven by the defendant Mullan, was involved in an accident with a lorry hired by the defendants Holmes, Mullin & Dunn Ltd. The lorry was the property of the defendant, the Ulster Transport Authority, and was being driven by a servant of the Authority.

The accident occurred on October 26, 1949, and Mr. Diamond was obliged to bring his action within six months, in so far as it lay against the Ulster Transport Authority, in accordance with the provisions of the Public Authorities Protection Act, 1893, as it then stood. The period within which such an action must be brought against a public authority is now a year (1), but at the time of this accident it was six months.

The plaintiff issued his writ at the end of the six months period, that is on April 25, 1950, but no service took place. It appears that negotiations were proceeding between the Authority and the plaintiff, and also between it and Mr. Mullan, the driver of the car in which the plaintiff was being carried. Apparently Mr. Mullan's action was settled but the negotiations between the plaintiff and the Authority broke down, and the plaintiff decided to continue his proceedings.

On April 3, 1952, Mr. Johnston, branch manager of the Authority's insurance company, wrote to the plaintiff's solicitors in reply to a letter of theirs of March 29, 1952, requesting the name of a solicitor who would be prepared to accept service of the writ on behalf of the insured. Mr. Johnston stated in his letter that Messrs. Fitzpatrick & Co. would accept

(1) Law Reform (Miscellaneous Provisions). Act (Northern Ireland), 1951, s. 9.

service, and it is claimed by the plaintiff that that statement meant that the Authority had waived its right to rely on the limitation period prescribed by the Act of 1893.

I cannot read the letter that way. What it says is that Messrs. Fitzpatrick & Co. will accept service, and I cannot take the view that this meant, or was understood to mean, that the defence under the Statute would not be relied upon.

That is material because the writ issued on April 25, 1950, had by then ceased to be in force and Messrs. Fitzpatrick & Co., though sent it on April 14, 1952, never gave the usual undertaking or entered an appearance. While a writ may be revived by the entry of an appearance, for ordinary purposes it ceases to be in force if not served within a year. Under Order 8, rule 1 a plaintiff may apply to have his writ renewed, but any application for renewal should be made within the period of the writ's validity. The plaintiff has applied under Order 64, rule 7 to have the time for renewal enlarged, and it seems to have been held that the court can enlarge the time for renewal in proper cases notwithstanding the terms of Order 8, rule 1. I appreciate that, but the difficulty which meets the plaintiff is that the Ulster Transport Authority is a public authority, and it says that if this application is granted (and it must be granted under Order 8, rule 1 as well as under Order 64, rule 7 to be of any use to the plaintiff) the effect would be to deprive it of its statutory right. The matter is, no doubt, in the discretion of the court, but it is the settled practice of the courts in this country and in England that the discretion should not be exercised so as to take away a statutory right : *Doyle v. Kaufman* (1). It is true that in *Holman v. Elliott* (2) a discretion exercised in favour of the plaintiff was affirmed and if that case stood as the last word on the subject it would be very much in point here ; but it was

(1) (1877) 3 Q.B.D. 7. (2) [1944] K.B. 591.

reviewed the following year in *Battersby v. Anglo-American Oil Co.* (1) where the judgment of Birkett J. following the earlier case was reversed by the Court of Appeal which reaffirmed the practice that had prevailed for years. Scrutton L.J. who was a great authority on these matters said in *Mabro v. Eagle, Star and British Dominions Insurance Co.* (2): "In my "experience the Court has always refused to allow a "party or a cause of action to be added where, if it "were allowed, the defence of the Statute of Limita- "tions would be defeated. The Court has never "treated it as just to deprive a defendant of a legal "defence. If the facts show either that the particular "plaintiff or the new cause of action sought to be "added are barred, I am unable to understand how "it is possible for the Court to disregard the statute."

Sometimes people are tempted to think that a plea of statutory limitation is anything but meritorious; but, however that may be, the courts have to regard the policy of Parliament. There may be cases in which the particular circumstances alter the position, as where a defendant has induced a plaintiff to hold his hand, or has lulled him into a false sense of security, so that the plaintiff's failure to act has been brought about by the defendant. There is, however, no trace of that element here. Nothing was done by the other side to mislead the plaintiff. I asked whether there was any reason for the failure to effect service in time and received no answer to that enquiry other than that negotiations were proceeding. The plaintiff's legal advisers should have kept the position in mind, and I do not see any reason in this case for not serving the writ within the appropriate time that can have any bearing on my decision. Accordingly, for reasons nowhere better set out than in the judgment of Scrutton L.J. above referred to, I think it would be quite wrong for me to accede to this application, seeing that if I were to do so it would be to deprive the defendant, the Ulster Transport Authority, of its statutory right.

(1) [1945] K.B. 23. (2) [1932] 1 K.B. 485, 487.

I cannot split this application. If I refuse it with regard to the Ulster Transport Authority, I must refuse it altogether.

Application refused.

Solicitors for the plaintiff : *George Martin & Co.*

Solicitor for the Ulster Transport Authority : *James F. Fitzpatrick.*

Solicitor for the defendant Mullan : *John M. Hughes.*

S.M.M.

IN RE P. F. AND M. L. F., BANKRUPTS (1).

Bankruptcy—Married woman—Sum lodged in bank representing money received as family allowances—Bankrupt entitled to sum free from claims arising out of bankruptcy—Family Allowances Act (Northern Ireland), 1945 (9 & 10 Geo. 6, c. 19), s. 10.

A husband and wife were adjudicated bankrupt. The wife had a sum of money standing to her credit at a bank which represented, inter alia, moneys received by her under the Family Allowances Act (Northern Ireland), 1945.

Held, that such moneys should be paid out to the wife upon trust for her children, free from any claims arising out of her adjudication.

APPLICATION by the bankrupt wife for a declaration that the sum of £207 standing to her credit at the Munster and Leinster Bank, Ltd. was held by her for her children and that the said sum be paid to her freed and discharged from all claims made in or by virtue of the order by which she was adjudicated bankrupt.

The husband and wife were adjudicated bankrupt and at the time of adjudication there was standing to the credit of the wife at the Munster and Leinster Bank, Ltd. the sum of £207 which she alleged represented moneys received by her, partly under the Family Allowances Act (Northern Ireland), 1945, and partly as presents given by relatives for the benefit of her children, It was claimed on her behalf that since this sum was held by her in trust for her children it should not pass to her assignees in bankruptcy.

McGonigal for the applicant.

Gibson for the assignees.

Cur. adv. vult.

SHEIL J.: Two questions have to be answered in this application, one of fact and the other of law. The question of fact is whether I am satisfied that the monies the subject matter of the application represent

(1) In the Queen's Bench Division (Bankruptcy) before Sheil J. July 4, November 7, 1952

monies which came into the possession of the wife, some as sums payable under the Family Allowance Act (Northern Ireland), 1945, and the remainder as presents given by relatives to her children, all such sums having been blended by her in one fund, and left by her in her home for the benefit of her nine children, until 1949 when, in the month of May, she opened an account in the Munster and Leinster Bank with part of the fund, retaining the remainder in her home for occasional needs. She stated that on one occasion she was sent by her husband to draw money from a joint account which she and he had in the same bank, that she found the bank premises closed, and that she gave him £100 from this fund pretending to him that she had drawn it from the joint account, and she further stated that she afterwards replaced that sum from monies of the business.

All this seemed highly suspicious to me, and that suspicion was increased on examination of certain unexplained pencilled entries in the bank book. When, however, Mr. McGivern, a bank official, gave evidence my doubts were set at rest. According to him, he made the entries in 1949 and 1950 to show that she had lent money to her husband. I may say at once that Mr. McGivern's evidence convinced me of what the applicant had suggested, that she was a thrifty woman married to a man who was " going to the bad." From the nature of things that was the only corroboration of the evidence which could be obtained, and it is sufficient to cause me to accept her evidence.

The question of law can be shortly stated. Is that part of this fund which is represented by sums paid under the Act of 1945 now vested in the assignees by reason of the applicant's bankruptcy? It is in her bank and in her name, and prima facie it is so vested. But section 1 of the Act provides for the payment of an allowance which is declared to be " for the benefit of the family as a whole." That phrase points the very purpose of the Act.

By section 4, where a man and his wife are living together, the allowance belongs to the wife though sums to be paid on account of the allowance shall be receivable either by the man or by the wife. The allowance is not the same thing as the sums to be paid on account of the allowance, (see section 7), and the allowance belongs to the man only if there is no wife in the household: (section 4 (1) (*b*).) To put it another way, the administration of the allowance is committed to the household, but it is so committed for the benefit of the family as a whole.

Section 10 provides that on the bankruptcy of a person to whom an allowance belongs no right in respect of the allowance or of any sum to be paid on account thereof shall pass to the assignees. If this lady had become bankrupt immediately after the passing of the Act, or indeed before its enactment, she would still have been entitled to the allowance, and to the custody and control of all sums to be paid on account thereof since the Act came into force, and if she had hoarded the sums they would have been unaffected by her bankruptcy. *In re Garrett* (1) throws no light on this.

There will be an order in the terms of the notice of motion. I make no order as to costs.

Order accordingly.

Solicitors for the applicant: *George Martin & Co.*

Solicitor for the assignees: *James Boston.*

J.P.

(1) [1930] 2 Ch. 137.

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Accordingly where a taxi cab which was engaged in cross-border traffic between Northern Ireland and the Republic of Ireland was damaged maliciously it was *held* that the court could award compensation which included, in addition to the cost of repairing the vehicle, (i) the amount of loss due to loss of use and profit while the vehicle was being repaired, (ii) the amount of additional duty in respect of new parts supplied in the course of repair which the owner would have to pay to re-engage in cross-border traffic. *Robinson v. Tyrone C.C.* .. .. [C.A. 54

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Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926, as amended by s. 1 (1) of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934, creates three distinct offences, viz., driving recklessly, driving at a speed which is dangerous to the public and driving in a manner which is dangerous to the public, a defendant cannot be convicted of more than one of these offences arising out of the same event or occurrence. So *held* by the Queen's Bench Division (Lord MacDermott C.J., Black L.J. and Sheil J.). *Held*, further by Lord MacDermott C.J. and Sheil J., Black L.J. dissenting on this point, that where a defendant has been convicted on more than one charge based on this section arising out of the same event or occurrence and there is nothing to guide the court in choosing between the convictions all must be quashed. *R. (Bowden) v. Belfast Justices.*
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SUMMARY JURISDICTION—APPEAL—*Recognizance for prosecution of appeal—Officer of customs and excise not exempt—Summary Jurisdiction and Criminal Justice Act (Northern Ireland)*, 1935 (25 & 26 *Geo.* 5, *c.* 13), *s.* 24. The Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, s. 24 (3) (*c*) provides that any person appealing from the decision of a court of summary jurisdiction shall enter into a recognizance to prosecute the appeal. By s. 24 (3) (*n*) an exception is made in a case where the appellant is "a public or local authority", *Held*, that an officer of customs and excise prosecuting an appeal in relation to an offence under the Customs Acts is not a public authority within this section and that accordingly such officer is not exempt from entering into a recognizance. An officer of customs and excise, though he sues on behalf of the Crown, does not shed his own personality in the process and the recognizance accordingly binds himself. It is not correct to view the proceeding as the Crown entering into an obligation with itself. *Dixon v. Forster & McMahon.* .. .. C.A. 24

SUMMARY JURISDICTION—LIMITATION OF TIME—*Recovery of arrears due under contribution order—Petty Sessions (Ireland) Act*, 1851 (14 & 15 *Vict.*, *c.* 93), *s.* 10 (4)—*Summary Jurisdiction (Separation and Maintenance) Act (Northern Ireland)*, 1945 (9 & 10 *Geo.* 6, *c.* 14), *s.* 6 (1)—*Children and Young Persons Act (Northern Ireland)*, 1950 (13 & 14 *Geo.* 6, *c.* 5), *ss.* 128, 132. In proceedings for the enforcement of a contribution order made under sections 121 and 122 of the Children and Young Persons Act (Northern Ireland), 1950, only those arrears of payment can be recovered which accrued during the six months immediately preceding the complaint. *Antrim C.C. v. Harkness* .. [Q.B.D. 41

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